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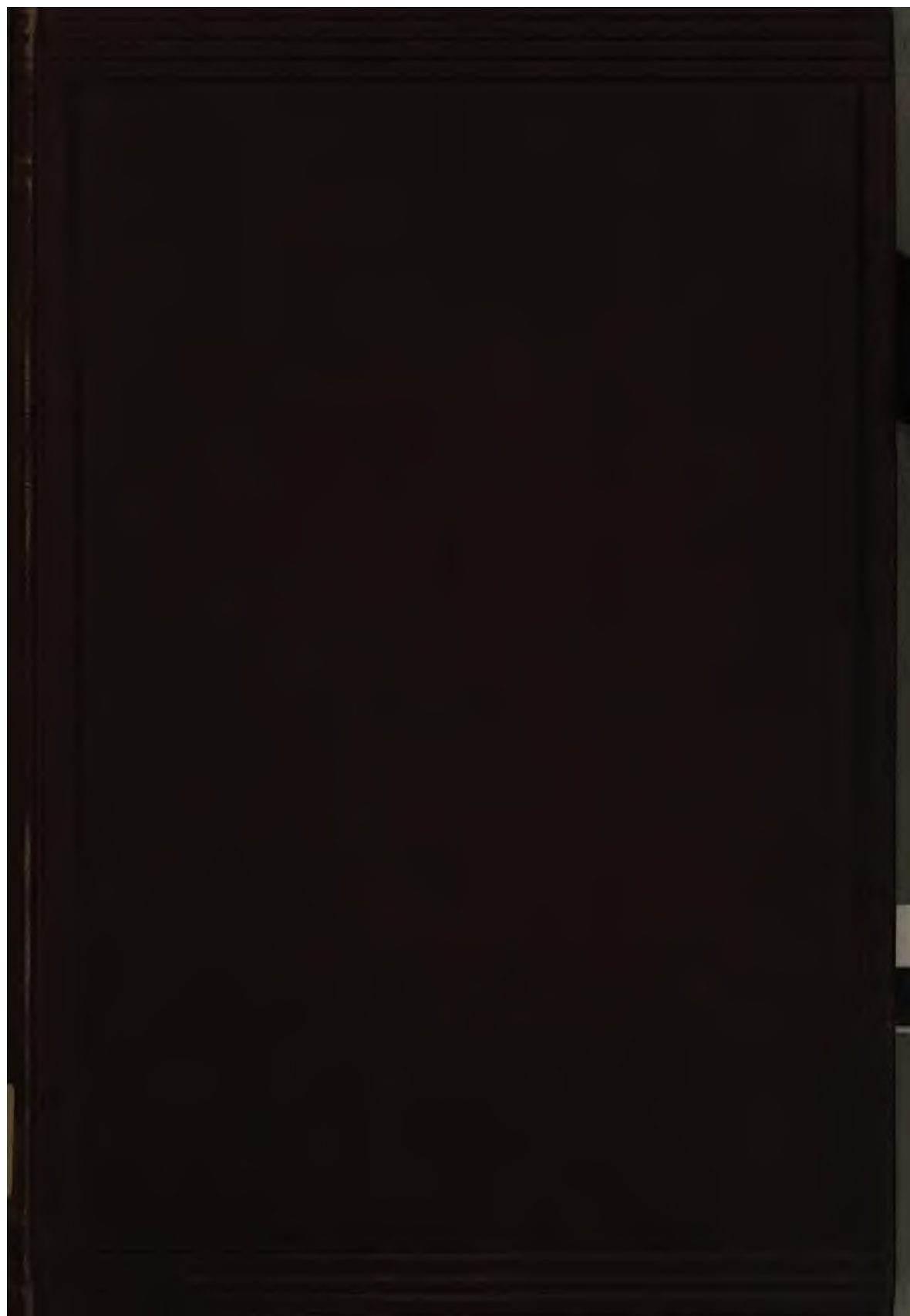
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THE SCIENTIFIC STUDY  
OF THE  
HINDU LAW



A PROSPECTUS  
OF THE SCIENTIFIC STUDY  
OF THE  
HINDŪ LAW

BY

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'On a de la peine à s'expliquer, après l'avoir lu, comment des jurisconsultes éminents ont pu imaginer et maintenir si longtemps une jurisprudence également contraire et aux droits des indigènes et aux maximes de l'administration britannique'—A. BARTH, in *Revue Critique*, No. 26, 1878

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1881



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## PREFACE.

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IT commonly chanches that the mind of the untutored English judge in India passes through three successive phases as touching evidence. In his early days he accepts without hesitation almost anything in the shape of evidence that may be set before him. Then comes a revelation. He learns the startling fact that a deal of evidence is not legally admissible, and for years he rejects, or regards with suspicion, almost everything that is offered. But, sooner or later, he will settle down comfortably in the middle course, accepting and rejecting with discrimination. Much the same sort of thing appears to have been going on in the matter of Hindû law. The earliest inquirers, and with them Jones and Colebrooke, seem to have believed whatever their *Pandits* (experts) chose to tell them. Then, after Colebrooke had left India, came what may be called the acute lawyer stage ; strongly marked towards its close by the contemptuous snuffing out of the poor, misunderstood *Pandit*. And quite recently we have come to the third stage,

in which wary Sanskritists like Goldstücker and Bühler have taught the student of Hindû law to take texts and *Pandits* (ancient and modern) for what they may be worth, and to seek everywhere for light. And now, with guides like Max Müller, Burnell, Mayr, Weber, Jolly, and others, explorers may hope to do much. In short, the scientific study of the Hindû law at last has become possible.

But ignorance dies hard, and reform must needs encounter terrible opposition from judges and lawyers who have picked up their law from the scientifically worthless treatises of Strange, Macnaghten, Grady, and the rest ; and have settled the principles of the Hindû law to their own entire satisfaction, if with little or no regard for the usages, ideas, wants, and aspirations of the so-called Hindoo. No man likes to be told that what he has been learning all his life is wrong, and of no account. And few love reform within their own households.

In 1877 I ventured to publish a 'View of the Hindû Law as administered by the High Court of Judicature at Madras,' for the purpose of showing that the divorce of orientalism from the study of the Hindû law had led, and was leading, to grievous error and disastrous results. The venture was hazardous. And the misgivings of friends certainly were to some extent justified by the reception that my opusculè met with at the hands of a portion of the

Indian press. But, from my point of view, the measure of success achieved, in arousing thought and disarming superstition, was so considerable that I have been emboldened to go a step farther. Having succeeded (as I hope and believe) in causing many to doubt whether the peculiar stuff at present administered as Hindû law to the non-Muhammadian part of the Indian population of the Madras Province is law properly applicable to any person, or should not rather be regarded as mere wild speculation, I have now gone on to endeavour to bring home to the public understanding the nature and extent of the difficulties that beset and complicate the whole question of the study of Hindû law in South India, and at the same time faintly to indicate the course that probably such study may most conveniently take. And in particular I have endeavoured to show that it is possible for Government at once to do much towards the reformation of the Hindû law.

That Government may be induced to turn its attention to this important subject, and free the Indian from the oppressive servitude imposed on him by judge-made law, is my earnest hope, as it is my main object in writing this essay. If, in the excitement of doing my best to help to overturn an ill-built, unsubstantial edifice, I have written things that may seem to show too little regard for the feelings of worthy persons, I trust that my clumsiness may be

forgiven, and malice may not be imputed to me. Assuredly offence has not been intended.

In conclusion, I should state that the text of this book has already been published at Madras in the *Indian Jurist*, and I have to thank the proprietor of that journal for courteously permitting me to reproduce it in its present form. Nor must I omit to express my gratitude for most precious assistance given by Dr. Burnell. The value to me of his many hints and suggestions it were impossible to over-estimate.

J. H. NELSON.

CUDDALORE: April 1881.

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# A PROSPECTUS OF THE SCIENTIFIC STUDY OF THE HINDŪ LAW.

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## CHAPTER I.

*Recent Madras Works upon Hindū Law—Unsatisfactory Administration thereof—Value of Mayne's Book—Cunningham's Codelet—Blunders in it—Servile Śūdras—Three Classes of Opinions in respect to Hindū Law—Going back to Manu, etc.—The Common-sense Englishman's View—Hindū Law for the Brahmans—A supposed silent Revolt against Usage—The Fifteen false Principles—The Apotheosis of Menu—Harm done by Sir William Jones—Halhed's Gentoo Code—The Digest—Proposed Topics of Inquiry.*

DURING the last few years Madras has shown a quite extraordinary interest in what is called Hindū law. We have had in rapid succession Norton's *Leading Cases*, various treatises done into English by Burnell, Nelson's *View of the Hindoo Law*, Mayne's *Hindoo Law and Usage*, Cunningham's *Digest*, and other contributions to the literature of the subject. At no previous time has so great an activity been displayed in South India in attempting to throw light upon this obscure and (to most minds) somewhat unattractive department of learning; and surely some thanks may be claimed for these writers, even if they have actually accomplished but little and the

domain of Hindû law still remains for the most part a trackless desert. For, at all events they have done this much : they have made known to the general public the fact that the administration of the Hindû law by the tribunals of the Madras Province, if not by those of India generally,<sup>1</sup> is in a thoroughly unsatisfactory state ; that when elementary principles of that law are dealt with by the courts, all is uncertainty and confusion ; that in consequence of ill-considered, conflicting decisions, many wealthy and influential Indians are in doubt as to whether they are legally and validly married, adopted and 'separated' ; and that in some districts the value of land has fallen considerably because money-lenders are afraid to advance sums upon what has become questionable security. To have learnt this is a great matter. And there can be but little doubt but that within a few years time the Legislature will feel compelled to turn its attention to Hindû law, and endeavour to remedy to some extent the truly serious evils pointed out by the writers above-mentioned.

Mayne's *Hindoo Law and Usage* may be regarded as peculiarly valuable and important, not only because it is the work of a real lawyer and scholar, and good in itself, but because it shows that, 'after

<sup>1</sup> As to this, see Goldstücker's paper of 1871 on the deficiencies in the present administration of Hindû law, and V. N. Mandlik's *Hindû Law* ; also Boulnois and Rattigan's *Notes on Customary Law*. I see no reason to suppose that Madras is more wanting than other provinces of India in knowledge of Hindû law. Everywhere the mistake appears to have been made of supposing that a particular treatise (e.g. the *Mî-tâkard*) is a final authority, whereas (as pointed out by V. N. Mandlik) 'there is no binding *vyavahâra* work followed by the people, who go according to their customs.'

fifteen years acquaintance with the litigation of every part of the Madras Presidency,' the writer is well aware how little is known as yet about the Hindû law and its applicability, and freely admits that 'a really satisfactory treatise on Hindû law would require its author to be equally learned as a lawyer and an orientalist.' Perhaps nothing could show more clearly than does the preface to Cunningham's *Digest* how wide and deep is our ignorance of Hindû law, how great the embarrassment that is felt by the courts in dealing with matters apparently most simple when questions of that law arise, how terrible the uncertainty that surrounds the rights of almost every member of an Indian house, and how disastrous are the results of judge-made law, applied to cases of inheritance, succession, and the like arising between Indians. But when it comes to the question, how can we remove this ignorance, how cure the evils that flow from it? the writer of this *Digest* can see no difficulty about the matter, no reason why everything should not be set straight within a year or two, nothing to prevent universal satisfaction being obtained at the cost of a moderate amount of labour and a few thousand rupees. 'Let us have a little code,' says this amiable and sanguine reformer, 'and all will be well. Anybody can put one together. I have put one together myself; here it is in my *Digest*; with a few alterations I have no doubt it will do perfectly well.' Now I have no desire to undertake the unpleasant task of criticising this very remarkable production, this little code that has been put together

with a light heart, but I am constrained to pause for a moment to point out one or two blunders in the work which show at once how much needs to be learnt before any man, however gifted, can hope to write a respectable treatise on Hindû law. The very first proposition in the *Digest* is that, 'the Hindû law applies to all Hindoos.'<sup>1</sup> But no attempt is made in any part of the work to explain what is meant by the term 'Hindoos,' and it seems to be quite certain that the learned author has no conception of the existence in the minds of capable persons of doubt as to whether there are at the present moment any Hindoos other than Brahmans in the Madras Province. Then, a little farther on, this *Digest* gravely tells us that there are four classes of Hindoos, namely, Brahmans, Khattris (*sic*), Vaisyas, and Soodras;<sup>2</sup> and that the Khatri class 'still exists as one of the regenerate classes, and is recognised as such throughout India;' whereas orientalists like Burnell

<sup>1</sup> V. N. Mandlik begins by stating that 'The Hindû law is the law of the *Āryan* community in India,' and goes on to show how difficult it is to define that body. In the Madras province the population seems to be almost entirely non-Āryan.

<sup>2</sup> The word *Sūdra* means literally 'sweater' (root *svīd*); and, according to Manu, the sole duty of a *Sūdra* was to serve others, principally Brahmans, and exhibit meekness. Servitude was his natural state, and he could not be emancipated. And he might not acquire wealth, for fear of causing pain even to Brahmans (ix. 324; x. 129). But Weber says (*Hist. Ind. Lit.*, p. 77) that in the *Śrauta Sūtras* the position of the *Sūdras* and of the *Nishādas* (Indian aborigines) was 'not one of such oppression and wretchedness as it afterwards became.' But when did these great divisions of the people become so 'oppressed and wretched'? I see nothing in Megasthenes, Fa Hian, or Hiouen Thsang, to show that either found them such. In the *Atharva Veda* (ix. 62, 1) the *Sūdras* are opposed to the *Āryas*; in other texts they are opposed to the three *varṇas* (classes).

have settled long since that not a *Kshattriya* can be found in the Madras Province, except perhaps on the western coast, and there are no *Vaiśyas*, and probably few, if any, *Sûdras* in South India. As to this last 'class,' the same work declares that it is 'termed the servile,' alluding, no doubt, to the foolish vilification of *Sûdras* by the *Mânavadharmasâstra* at a time when there were many *Sûdra* kings.

The preface to the *Hindoo Law and Usage* speaks of three classes of opinions as prevailing at the present time in respect to Hindû law. First, it is said, there is that of those who think that we have been paying far too much attention to recent interpreters of the law, and ought to go back for authoritative information to the earliest writers, such as Manu, Gautama, and the rest. Next, we have the opinions of those who, like the author of the *View of the Hindoo Law*, maintain that the Hindû law to be found in Sanskrit writings is applicable as a rule to Brahmans alone. And, lastly, we have the views of the 'common-sense Englishman,' who would sweep away all existing rules and doctrines of Hindû law, and replace them with a nice short code, that will please everybody, and about the meaning of which there could not be two opinions. Mayne laughs at the idea of our getting such a code, and there can be but little doubt that he is justified in doing so. The going back to the earliest known authorities he seems to regard as dangerous and unwarrantable, because the state of society now must be very different from the state of society 2,000 years or so since, when those



authorities may be supposed to have written their works. 'The real task of the lawyer,' he thinks, 'is not to reconcile these contradictions, which is impossible, but to account for them. He will best help a judge who is pressed, for instance, by a text which forbids a partition, or which makes a father the absolute despot of his family, by showing him that these texts were once literally true, but that the state of society in which they were true has long since passed away.' But with regard to this class of opinion, I would observe that to my mind there seems to be a much shorter and more forcible way of dealing with it, and that is by positively denying that the state of society which existed in Kâbûl or the Panjâb during the centuries in which the originals of the *Smṛitis* were compiled existed at any time in the country now styled the Madras Province. There can have been nothing in common between the Âryans who finally settled in the fertile tracts between the Ganges and the Jumna, and the *Drâviḍa* clans that founded the *Regio Pandionis* and the *Sêra* and *Sola* dynasties in the extreme south of India : and, in the absence of sameness of blood, of sameness of climatic and other natural surroundings, and of historical antecedents, it is impossible that the state of society arrived at by the former, could ever have been arrived at by the latter, people.

I cannot agree, therefore, with Mayne in thinking that, in order to ascertain what is the actual Hindû Law of the Madras Province at the present day, we ought to follow the course marked out by Mayr in his *Das Indische Erbrecht*, and by Sir H. S. Maine,

and endeavour to trace the changes that have taken place in Hindŭ society during the last twenty centuries. To do this would be as profitless, in my humble opinion, as to endeavour to find out the peculiar modern laws and usages of the Channel Islands by studying the early and medieval history of Christianity ; or to go to the Byzantine chroniclers for light wherewith to illustrate the puzzling customs of the Basques.

As regards the third view, recently put forward by the writer of this essay in his *View of the Hindoo Law*, which, in effect, is that the Hindŭ law is for the Brahmans and a few others, and ought not to be applied to the tribes and castes which form the great bulk of the population of the Madras Province, Mayne states that 'in much that he says I thoroughly agree with him.' 'But,' Mayne goes on to say, 'it seems to me that the influence of Brahmanism upon even the Sanskrit writers has been greatly exaggerated, and that those parts of the Sanskrit law which are of any practical importance are mainly based upon usage, which in substance, though not in detail, is common both to Aryan and non-Aryan tribes. Much of the present work is devoted to elucidation of this view.' And besides this Mayne thinks that the writer of this essay has under-estimated the influence 'that has been exercised throughout the whole of Southern India during the present century by means of our courts and pandits, by vakils and officials, both judicial and revenue, almost all of whom till very lately were Brahmans.' And by way of exemplifying this pro-

position Mayne describes a 'silent revolt' that went on for many years to his knowledge in Malabar, and that consisted in many natives endeavouring again and again to 'cast off their own customs, and to deal with their property by partition, alienation, and devise, as if it were governed by the ordinary Hindoo law.' This revolt, he presumes, would have been completely successful, indeed 'would have been a revolution,' had it not happened that whilst it was going on the Sudr Court possessed judges who thoroughly understood Malabar customs and carefully upheld them. Upon this I must remark that to me it seems most strange and unaccountable that it should never have occurred to the mind of so ingenious and experienced a lawyer as the former officiating Advocate-General of Madras that his numerous clients and opponents, who were so very anxious to 'cast off their own customs,' must have been so in order that they might improperly acquire or retain or deal with rights which, according to those customs, were not their rights but the rights of others. Nothing, for example, can be more natural than that one who by custom is only a manager or trustee of an estate for the benefit of others, should try to prove in our courts that he is by law the absolute owner of that estate. Successive attempts of this kind, however numerous, would never suffice to show that the majority, or a considerable minority, of a people were desirous of freeing themselves from the shackles of an inconvenient aggregate of customs and adopting a convenient body of laws in their place. Far from

agreeing with Mayne upon this matter, I venture to think that the people of this country, with few exceptions, continue to love and revere their ancient customs as they love and revere nothing else in this world; and that if the British Government were to resolve to abrogate these customs and replace them with something else, the people would vastly prefer a brand-new code of European make to the fanciful and mysterious treatises that are supposed to contain the ancient laws of the Brahmans.

Another main object of the *View of the Hindoo Law* was to show that the leading principles of the Hindû law administered by the High Court of Madras are quite erroneous, and inflict great injustice on the limited section of the population to which alone Hindû law is properly applicable. As regards this part of his case against the High Court, the writer may congratulate himself on having achieved an unexpected share of success, and it may now be hoped that several of the leading decisions of former judges will be reversed by their successors in the course of the next few years. For it cannot be denied that the doctrines of the so-called Hindû law which obtain at Madras are based for the most part on what was taught generations ago by Colebrooke, Strange, Macnaghten, and others, when the study of Sanskrit was in its infancy, and inquiry as to the manners and customs, the languages and modes of thought prevailing in India had hardly begun. In short, the learning upon which the Madras High Court has relied is old-fashioned and obsolete; except, indeed,

where it has thought to discover the existence of analogies between Sanskrit concepts and those of ancient Rome and modern Germany. But, whether right or wrong in respect to the fifteen 'false principles,'<sup>1</sup> the *View*, at all events, may claim the merit of being the first to bring prominently to the notice of the public mind that, if the Hindû law is to

<sup>1</sup> The 'false principles' are the following:—

1. That there exist, or formerly existed, in India certain '*Schools of Hindû Law*;' and that such schools have authority in certain imaginary parts of India, such as the Karṇāṭaka kingdom, the Ândhra country, the Drāviḍa country, &c., &c.

2. That the so-called 'Hindû law' is applicable to all persons vulgarly styled '*Hindûs*,' and to their descendants, however remote, and whether pure or not pure.

3. That a custom which has never been '*judicially recognised*' cannot be permitted to prevail against distinct authority.

4. That a state of union is the normal and proper state of a Hindû family, and therefore non-division should in all cases be presumed until the contrary be proved.

5. That, as to ancestral property, a son, and therefore a grandson, may compel a division against the will of his father or grandfather.

6. That a member of an undivided family can aliene joint ancestral property to the extent of his own share.

7. That '*self-acquired property*' ordinarily is indivisible.

8. That debts incurred by the managing member of a Hindû family should be presumed, in favour of a minor, not to have been incurred for the benefit of the family.

9. That the widow of an undivided coparcener, whether childless or not, has no title to anything but maintenance.

10. That ancient *Zamindâris* are not divisible because they are '*of the nature of principalities*.'

11. That one, with whose mother the adopter could not legally have married, must not be adopted.

12. That the *Āliyasantānada Kaṭṭu Kaṭṭale* is a work of authority on the law of South *Kannaḍa*.

13. That '*survivorship*' is a principle upon which the rule of succession in part depends.

14. That a widow can adopt a son with the consent of her husband.

15. That a Hindû family may be at one and the same time divided and undivided.

be rescued from utter destruction, we must turn for help to the Sanskritists and orientalist, and discard for ever the scientifically worthless treatises of Strange, Macnaghten, Grady, and the rest. When once it is fully comprehended that Hindû law means Sanskrit law, and that Sanskrit law must be explained slowly and surely by Sanskritists, before ordinary jurists may step in and interfere, the future of Hindû law is assured.

Before the administration of that law can be placed upon a satisfactory footing, very extensive inquiries must be made as to what should be considered to constitute Hindû law, as distinguished from usage and custom, and to what classes of the people it should be applied. And the aim of this little work will be to indicate as clearly as may be the ends to which such inquiry should be directed, and how such inquiry should be conducted. But little can be done to improve matters without continuous, conjoint effort : and at the same time it will be highly necessary for those who make the effort, to keep certain definite aims steadily in view. How fruitless, even dangerous, may be the results of isolated, independent study of Hindû law, is shown by what we may call Sir William Jones' Apotheosis of Menu. It may well be doubted whether before that eminent Sanskritist published his translation of the *Dharmaśâstra* of the religious fellowship called *Mânava*, and inanely styled the work the *Institutes of Menu*, a single pandit of Conjeveram or Tanjore or Madura had ever suspected the former existence

of a lawgiver named Manu to whose memory infinite reverence, and to whose edicts perfect obedience, was due. But after the appearance of the celebrated *Institutes* the English all over India, and through them numberless natives of India, incontinently took it for granted that the nondescript manual of the extinct *Mânava*s was a law-book for all Hindûs, in the same sense and to the same extent as was the *Institutes of Justinian* for the people of Rome. Thus, for example, we find it declared in Colebrooke's paper appended to Volume I. of Strange's *Hindoo Law* that, 'the law, civil and criminal, is to be found in the Smriti,<sup>1</sup> otherwise termed Dharma-Sastra . . . forensic law is more particularly understood when the *Dharma Sâstra* is treated of.' Strange, of course, followed Colebrooke, and later writers followed Strange, and now at last we find at page 16 of Mayne's *Hindoo Law and Usage*: 'The Code of Manu has always been treated by Hindoo sages and commentators, from the earliest times, as being of paramount authority.' Now, it may be questionable how far the Hindûs of old believed in the absolute truth of the supposed utterances of a mythic and mysterious Manu, presented to the imagination now as a divine spirit, now as a human being, now as the progenitor of all, and again as a mere sage: but that any class of Hindûs, save perhaps the *Mânava*s, at any time regarded the *Mânava Dharmaśâstra* as a law-book of paramount authority, no person who has

<sup>1</sup> By '*Smriti*' is understood a mere 'recollection,' as opposed to the '*śruti*,' or direct revelation. See Max Müller, *A. S. L.*

the most elementary knowledge of things Hindû can for a moment suppose. When Sir William Jones, misled by defective information, made all the world believe that this modern paraphrase of the teaching of a particular religious fellowship was a code of law compiled and published in very early times by a heroic lawgiver, 'Menu,' for the use and benefit of all the dwellers in the continent of India, his great reputation enabled him to do an injury to Hindû law of which the ill effects have lasted to the present day. The world still believes in 'Menu' as a lawgiver; and, as we have seen above, Cunningham still believes in the 'four classes of Hindûs,' and the continued degradation of the unhappy *Sûdra*.

The scholarly instincts and accuracy of thought that ever marked the minds of Jones and Colebrooke, caused both of them to throw aside as valueless the curious compilation known as Halhed's *Gentoo Code*. That work was hastily put together by a number of ignorant and incompetent persons, the honesty of whose motives is by no means above suspicion, and having been badly done into Persian by Hindûs, was badly done into English by Halhed; but I nevertheless imagine that it contains valuable matter, and, rightly used, might offer a clue to the solution of not a few difficulties. In the first place, it ought to be possible to gather from various parts of the work who were the legal authorities, what the legal topics, most highly thought of by the Indians of the last century,<sup>1</sup>

<sup>1</sup> That is, by those of North India. Anquetil Duperron (*Leg. Orient.* p. 307) properly observes that 'this Code does not present the laws of



before opinions had been expressed upon these matters by Englishmen ; before any speculative treatise upon Hindû law had been declared to be the 'paramount authority,' and before the existence of 'schools of law'<sup>1</sup> had been announced or even suspected. Second, we ought to be able to learn from it something as to the peculiar doctrines of the pandits of Mithilâ,<sup>2</sup> when that city was still renowned throughout Northern India for its successful devotion to study and independence of thought. And then, amongst other things, we might consider with great advantage the peculiar usages and customs<sup>3</sup> referred to in the *Gentoo Code*, as, for example, that when a Śûdra woman bears a son to A, and takes that son away and lives with B and bears a son to B, each son inherits his father's goods after his father's death, and after his mother's death takes what his father may have given to her.

Another purely native work of considerable importance, written not long after the *Gentoo Code*, is Jagannâtha's extensive compilation, which was translated by Colebrooke and is known as his *Digest*. It

all India: we shall find on the Malabar and Coromandel coasts laws contrary to those it contains about successions and inheritances.'

<sup>1</sup> Burnell and others have shown up the absurdity of the purely European idea of schools of law. See my *View of the Hindoo Law*, pp. 20-7 ; Mandlik's *Hindû Law*, Introd. lxx.

<sup>2</sup> For example, in treating of succession to the undivided brother in preference to the widow, this Code says that such succession is according to the law of Mithilâ ; but Jimûta Vâhana, Smârta Bukkâchârya, Sri Krishna Tarkalankâra, and others, say that (in default of sons, &c.) the wife takes all, division or no division, and *this is approved*.

<sup>3</sup> This Code declares that every kingdom has its own customs ; every town, every tribe. Custom sanctions unequal division.

may be doubted whether the courts and writers upon Hindû law have not unjustly depreciated and despised this laborious repertory of legal knowledge, and whether its importance will not come to be acknowledged before very long by earnest inquirers after truth.<sup>1</sup>

But enough of this for the present. I must go on to give a rough outline of the topics of inquiry that, in my humble opinion, must be thoroughly investigated before reform of the Hindû law can be seriously commenced. I use the epithet 'rough' advisedly, because I do not pretend to be able to give anything better than a rough outline. If I did, necessarily I should also profess to have a considerable acquaintance with, or insight into, Hindû law; whereas I profess to have nothing of the kind, but on the contrary frankly admit that I know next to nothing about that law, because as yet the requisite materials for knowledge of it are wholly wanting. The outline must of necessity be neither chronologic, nor systematic, nor accurate. All that can be attempted (because if more is attempted, success is not to be hoped for) is to indicate some of the many directions

<sup>1</sup> See Colebrooke's letter at II. Strange, 175. He says the Madras pandits 'made great use of the authority of Jagannatha;' and it would be regrettable if that should supersede the authority of 'the much abler authors of the *Mitacshara*, *Smriti Chandrica*, and *Madhaviya*.' Was Colebrooke right, or were the Madras pandits? From his preface to the *Two Treatises*, p. ii., it appears that Colebrooke disapproved of the *Digest* mainly because the compiler followed the native *mīmāṃsā* method, and not the European 'various schools' method! Dwarkanath Mitter, J., in the case reported at 13 B. L. R. 50, pronounced a very high eulogium on the *Digest*. Mayne thinks highly of it. See § 32.

that research must take, some of the wide areas of investigation that must be thoroughly worked up, before even a satisfactory view of the field of Hindû law can be obtained.

Full and accurate information, then, is believed to be needed upon the following points, namely :—

(1) With respect to the *Dharmaśâstras* : when, and in what circumstances, and with what objects, were they first composed ? And do the metrical recensions that have come down to us from comparatively recent times contain the substance of what was reduced into writing in the form of the ancient prose *Sûtras* ?

(2) Upon what points, and to what extent, do the existing *Dharmaśâstras* differ one from another ? The writers of the modern so-called digests failed in their endeavours to bring everything into harmony—would it be possible for others by any method to reconcile the differences in the *Smritis* ? Or do the ancient works represent different laws administered to different clans ?

(3) What are the precise ideas denoted and connoted by the words *Charana* and *Śâkhâ* respectively ? To what extent, if any, was it lawful for *Charana* A to accept and follow the doctrine of *Charana* B ? What *Charanas* adhered to the old ‘black *Yajur-Veda*,’ and what to the new ‘white *Yajur-Veda*,’ founded by *Yājñavalkya*, of the family of the *Vâjasaṇeyins* ? What was the nature of the religious movement which followed upon the foundation of the

new *Veda*, and how far was it connected with Buddhism ? Was *Yājñavalkya* a Buddhist teacher ?

(4) Who were the *Mānavas*, whose *Dharmasāstra* is known as the *Code of Menu* ? Where did they live ? When did they become extinct ? What sect, if any, now represents them ? Were they very numerous, or powerful, or notable, or was there anything special about them that induced other sects to govern themselves by their teaching ? And, in particular, did their influence reach down to the South of India ?

(5) What was the origin of the now celebrated *Mitākṣarā* of *Vijñāneśvara* ? Where, when, and with what object, or for whose benefit, was it compiled ? Is the existing the original text, or a quite modern recension ? Who was the author ? What are the grounds for the belief that this work was, and is, the 'paramount authority' on inheritance and succession over a considerable part of India ? Does it contain any positive laws or commands, or any collection of actual usages and customs, or is it a mere exposition of speculative opinions of a religious recluse upon subjects with which he could not possibly be conversant ? Was the work at any time considered authoritative, in so far as it professes to deal with law, in the countries of South India ? And what is the truth about other so-called works of authority in the Madras Province ?

(6) To what extent have Brahmanism, Buddhism, and Jainism, respectively, acted and reacted upon the religious beliefs and practices of the population of

South India? What should be understood at the present time by the term *Hindû*? Are the *Vaishnava*, *Śaiva*, and other principal sects to be regarded as *Hindû*? What is the true history of the feud between the '*Right-hand*' and the '*Left-hand*'? How far does the antagonism between these two great divisions of society extend—for example, does it preclude the members of one division from accepting and respecting religious, legal, and other works that are accepted and respected by members of the other?

(7) What is meant by, and included in, the term *Drâvida*? What portions of the population of South India may be supposed to be *Drâvida*? What was the origin of the family? What its state of civilisation in early times? How have Brahmanism and *Drâvidism* acted and reacted on one another?

(8) May the population of South India be made by any method of classification to sever into a few principal divisions, or will it be found on inquiry to consist of numberless independent and mutually repellent aggregates? Hitherto the inhabitants of the Western Coast have been assumed to be quite different and distinct from all other castes and tribes. Is the assumption warranted by facts, or do Western Coast practices, such as polyandry and succession in the female line, prevail elsewhere than on the Western Coast? To what extent do important customs, such as the preference of the son-in-law to the natural son as heir, and the custom of the father cohabiting with the son's wife prevail?

(9) A few collections of usages and customs of

so-called Hindûs exist and are accessible, as Boulnois and Rattigan's, Steele's, that of the Ceylon Tamils, and perhaps some few others. How far do they resemble and differ from one another? And to what extent, if any, do the rules contained in them appear to be based upon, or sanctioned by, the received Hindû law-books, or appear to agree with such notices of local usages and customs as are found in Hindû law-books?

(10) Brahmans ought to govern themselves by their respective *Śākhās*. Do they? What are their usages and customs? To what extent do the usages and customs of *Āyyangārs*, for example, differ from those of *Āyyars*, *Raus*, and other divisions of Southern Brahmans? In what respects and to what extent do the usages and customs of the principal non-Brahman castes, *e.g.*, the *Chettis* and *Mudalis*, differ from those of the Brahmans and of one another? What are the most remarkable of the usages and customs of non-Brahman castes, and how far are they consistent or inconsistent with the Hindû religion and status?

(11) To what extent do the Mahomedans of the Madras Province follow the usages and customs of other non-Brahman castes, for example, the custom of living together in undivided families, in a state of coparcenary?

(12) What was the nature of the authority exercised by *Gurus*, heads of castes, heads of villages, and caste-meetings, respectively, in settling disputes of a civil nature, and punishing crimes and transgressions, before the establishment of the British power? And

what portion, if any, of the authority of any of them survives ?

This list of topics of inquiry of course is by no means exhaustive, and might without difficulty be added to : but I believe that I have suggested enough for my purpose, and will now go on to explain with some fulness the precise nature of each of the questions above proposed, so that readers may perceive its special bearing upon the principal question, What is the Hindû law of Madras ?

## CHAPTER II.

*Inquiry must begin with the Dharmasāstras—The Aryan split into Kulas—The prose Sūtras—Their probable time—Effect of the triumph of Buddhism—Parīśiṣṭas—Writing in India—Interval between the Sūtra era and 'Menu's Code'—Megasthenes' account of the Indians—Four metrical redactions of Manu—The Java Code of Manu—The Burmah Code of Manu—Vṛiddha and Brihan Manus—Hiouen T'sang's account of India—Fa Hian—The extinction of Buddhism—Probable age of 'Menu's Code'—Its object—The Yājñavalkya Dharmasāstra—Its author—The white Yajur-Veda—Saivites—Yogis—The Smṛitis—Mādhava's pious fraud—Sir William Jones' golden egg—The Indians have no laws—Anquetil Duperron—Vijñāna—The Mīṭākāra.*

As regards the first topic, the *Dharmasāstras*,<sup>1</sup> it will be apparent to all that since the modern treatises on Hindû law profess to be based on the commentaries and so-called digests, and to derive all their authority from those works, and the commentaries and so-called digests profess merely to give the meaning of the *Dharmasāstras*, no study of the Hindû law could be thorough and fruitful that did not begin with an inquiry into the origin, history, and authority of these latter compositions.<sup>2</sup> Such an

<sup>1</sup> For the meaning of *Dharma* see p. 40, n, below. *Sāstra* means a didactic or explanatory work.

<sup>2</sup> Thus Bühler says (*Digest*, Introd. xxxv.): 'For the lawyer of the present day the Veda has little importance as a source of law. . . . But a careful investigation of the state of the law as it was in the Vedic age, will no doubt yield important results for the history of Hindû law.' Burnell says in his Note to the *Dāyadāçaçloki*, 5: 'The small part of Hindû law that has still a practical value is not the only part that is of importance . . . the whole system is of immense use.'



inquiry, therefore, shall be my first subject of consideration. It seems to have been satisfactorily established by Max Müller and Bühler that, many centuries before the Christian era, the Âryans split up into numerous *kulas* or divisions, each of which thought fit to compose and publish orally a set of prose works for the purpose of justifying and securing its separate entity. A set of prose works so composed and published was always threefold, and consisted of three separate and distinct parts ; one, the *Kalpa*, on the great Vedic sacrifices ; another on the sacrifices, rites, and ceremonies proper for households ; and a third on laws and customs proper for individuals. The two last parts, with which alone we are concerned, were styled *Grihiya-* and *Dharma-Sûtras* respectively, and may be supposed to have contained the very quintessence of the knowledge accumulated by successive generations, parts of their forms being about the only things owing to their actual authors. With the *Grihiya-Sûtras*<sup>1</sup> are connected the *Dharmaśâstras* ; and as Weber tells us<sup>2</sup> : ‘ Most of the names current as authors of *Grihiya-Sûtras* are at the same time given as authors of *Dharmaśâstras*. The distinction, as a commentator remarks, is simply this, that the *Grihiya-Sûtras* confine themselves to the points of difference of the various schools, whereas the *Dharmaśâstras* embody the precepts and obligations common to all.’ Whilst *Grihiya-Sûtras* are common in different parts of India, and whereas com-

<sup>1</sup> The meaning of ‘ *sûtra* ’ appears to be uncertain.

<sup>2</sup> In his *History of Indian Literature*, p. 278.

plete sets of the threefold works are known to have been once very numerous, but six *Dharma-Sūtras* at present exist, namely, the *Āpastamba*, *Hiranyakeśin*, *Baudhāyana*, and *Kāthaka*, which still form part of the *Sūtras* of those schools that study the 'black *Yajur-Veda*,' and the *Gautama* and *Vāśishṭha*. This is a remarkable circumstance, because one would naturally expect to find the surviving *Dharma-Sūtras* to be at least as numerous as the *Gṛhiya*-, and to be connected, some of them, with the 'white *Yajur-Veda*.' Can it be that the proclamation of the latter *Veda* marks the commencement of a new era in which respect for the individual, and for law as Europeans understand the phrase, was destined to die out, or at all events to be minimised ?

It is not yet known when these prose *Sūtras* were composed and published, but Max Müller thinks it possible that their dates may be referred roughly to the time between 600 and 200 B.C., and that the contents of the *Dharma-Sūtras* seem to prove them to be the latest of all. And, according to Burnell<sup>1</sup> : 'There is no reason to doubt that the *Dharma-Sūtras* are referred to in the *Mahā-Bhāshya*, the date of which (viz., 140–120 B.C.) has been determined by Dr. Goldstücker, and they must therefore have been in existence about two thousand years ago.' Now, the date of Aśoka and of the triumph of Buddhism is stated by Max Müller to be 250 B.C. ; and the question naturally arises, how far and in what manner did the consummation of that triumph affect

<sup>1</sup> Introduction to *Dāya-Vibhāga*, vii.

the course and aim of Brahmanic literature ? If Max Müller is right in supposing that the object of the Vedic *Charanas* (religious fellowships) in composing the *Sûtras* was 'to remove, or at least to simplify, the difficulties of their teaching,' because Buddhism was beginning to attract attention and win frequent adherents, then, since the new faith nevertheless triumphed, it would seem to be likely that the Brahmins would have perceived in time the necessity of adopting a more popular and agreeable vehicle of instruction than the dry and fantastic *Sûtra*, and accordingly would have brought out some new justificative works in the centuries immediately preceding and following the birth of Christ. But if so, probably those works were not very successful or of considerable importance, and at present there would appear to be no reason to suppose that any such works composed about that time have come down to us. The *Parîśishtas* seem to be of much later date than 250 B.C., since their writers had known the success of Buddhism and decay of Brahmanic learning ;<sup>1</sup> and it is desirable to know what Brahmanic writings came next after the *Parîśishtas*.

Readers will have observed that I speak of the *Sûtras* as having been composed in prose : perhaps it would have been more correct to say, in the words of Burnell,<sup>2</sup> that 'the original *Sûtra* works consist almost entirely of prose.' And it appears from Max Müller<sup>3</sup>

<sup>1</sup> See Max Müller, *Ancient Sans. Lit.*, pp. 260 et seq.

<sup>2</sup> Introduction to *Dāya-Vibhāga*, i.

<sup>3</sup> *Ancient Sans. Lit.*, pp. 520 and 507.

that : ' The first actual writing, the first well-authenticated inscription in India, is of Buddhist origin,' namely, the earliest inscription of Aśoka in the third century B.C. ; and before Pāṇini and Buddhism, writing, at all events for literary purposes, probably was unknown.<sup>1</sup> Seeing, therefore, how conservative a race the Brahmans have ever been, how careful to guard their own power and influence, it seems to be but reasonable to suppose that a very considerable space of time must have passed before they could bring themselves to compose in verse and to commit their compositions to writing ; in other words, that there must have been a considerable interval of time between the date of the composition of the latter *Sûtras* and the date of the writing of the earlier metrical redactions of *Sûtra* works. And if, as seems to be thought probable, one of the earliest metrical redactions was the lost *Dharmaśâstra* said to have been taught by Brahma to Manu, and that composition was the ultimate foundation of our existing text of '*Menu's Code*,' how long must not have been the interval of time before the state of Âryan society during the *Sûtra* era could have developed itself into the state figured by '*Menu's Code*' ?

It so happens that we have a remarkably full and satisfactory account of Âryan life during the *Sûtra* era, preserved to us in fragments of Megasthenes, who re-

<sup>1</sup> It must not be forgotten that in Megasthenes' time (see his Frag. xxxii.) some of the philosophers used to commit to writing whatever useful suggestions might occur to them ; and at the great council, held once a year, declare the same publicly. This custom may be compared with what Hiouen Tshang tells us about the official '*Blue-books*,' at II. 67.

sided for many years at Palibothra,<sup>1</sup> as ambassador to the great Indian king, Chandragupta, the grandfather of Aśoka. And it is impossible to read this account without being struck by the extraordinary difference between the Indians as Megasthenes knew them, and the Indians as portrayed in the wearisome verses of the *Mānavadharmasāstra*; between the simple, happy people of the earlier, and the priest-ridden, intolerant, proud, and self-regarding people of the later, age. For example, Megasthenes states that the population was divided into seven parts, namely, philosophers,<sup>2</sup> agriculturists,<sup>3</sup> herdsmen and hunters,<sup>4</sup> artisans,<sup>5</sup> fighting men,<sup>6</sup> inspectors,<sup>7</sup> and the official class: and has not a word about 'the four classes' of *Brahmans*,

<sup>1</sup> Identified with *Pataliputra*, or old Patna. See McCrindle's translation of Megasthenes, and Schwanbeck's Megasthenes.

<sup>2</sup> Of two classes, *Brahmans* and '*Sarmanes*.' The latter are generally supposed to have been Buddhists, and may have been Jains. See what is written below.

<sup>3</sup> According to Fragment xxxii., these formed the second class and the bulk of the population. The whole of the land was the property of the King, and the cultivators got one-fourth of the produce for their share, as they do now in many villages of South India.

<sup>4</sup> These alone were allowed to hunt, and to keep and deal in cattle. They led a wandering life, living under tents. Their principal duty was to clear the country of wild animals and vermin. In the course of time they would seem to have become *Chandālas*. See Beal's *Fa Hian*, p. 55.

<sup>5</sup> It is observable that this class, which includes traders as well as ordinary labourers, is expressly stated (in Frag. xxxii.) to have come after the 'herdsmen and hunters,' whilst it takes precedence of the fighting class.

<sup>6</sup> These do not appear to have been regarded by Megasthenes as a noble class. He observes that when not on active service they passed their time in idleness and drinking, being maintained at the King's expense.

<sup>7</sup> In Strabo '*ephoroi*,' in Arrian '*episcopoi*.' The common name for a Brahman in Tamil is still '*pārpān*,' or, 'he who sees.' These spies would appear to have been numerous and active in Aśoka's time. See his inscriptions v. and vi., *Journal R. A. S.* xii. Art. 5.

*Kshattriyas*, *Vâîśyas* and *Śûdras*. He tells us that equality was the principle respected in all things, in accordance with law handed down from remote times ; hence slavery was abhorred by the people, and no Indian was a slave.<sup>1</sup> The people were so simple in their mode of life, he says, that disorderly conduct was most rare, even in the huge camp of the King. And this amongst men whose laws were unwritten. For they did not know official writings, but were in the habit of managing their affairs, of whatever kind, from memory.<sup>2</sup> And in the matter of their laws and pecuniary transactions their simplicity was proved by the fact that they had not many forms of action. For they had actions neither of pledge nor of deposit. Nor did they feel the need of attesting witnesses or seals, but they gave credit at their own proper risk. Moreover they left their household goods for the most part unguarded. The artisans<sup>3</sup> were maintained by the King, and if any one caused an artisan to lose a hand or eye he was put to death for it. No man might marry out of his class. They used to

<sup>1</sup> Manu, on the contrary (at viii. 413-4), says that servitude is the natural state of the *Śûdras*, and cannot be determined even by emancipation ! And Jagannâtha's *Digest* enumerates various modes by which a person becomes a slave. In Frag. xli. Megasthenes states that one of the objects of the Brahmans in marrying many wives was to get many children, since they kept no slaves.

<sup>2</sup> I give my own literal translation of this important passage, which has been thought to favour the idea that Megasthenes was aware of, and here alludes to, the existence of the *Smritis*, or 'recollections.' And Max Müller (at *A. S. L.*, p. 515) says, 'Megasthenes declared that the Indians did not know letters.' The contrary, however, is the case. See Megasthenes, frag. xxxii., which shows that these philosophers used to write.

<sup>3</sup> That is, those who made arms and built ships for the King.

marry very many wives, whom they bought,<sup>1</sup> generally each for a pair of oxen,<sup>2</sup> some to make servants, some to make mistresses. The dead were buried. Suicide, though apparently not unfrequent, was disapproved of by the philosophers.<sup>3</sup> The King was protected by a body-guard of Amazons, and apparently kept a prisoner by them within the walls of his palace. And if a woman caught the King drunk, and killed him in that state, she was rewarded by having intercourse with his successor, who ordinarily would be the King's son. Such are a few of Megasthenes' interesting observations touching the life and manners of the Indians of his time ; and it is difficult, it seems to me, for one who considers all that has come down to us of this author's account, to avoid the conclusion that almost as many centuries as separate us from the Indians of the '*Code of Menu*,' may have separated Megasthenes' Indians from the same.

According to Sir William Jones, the tradition runs that what was taught by Brahma to Manu in 100,000 verses was taught by the latter to Nârada in 12,000, and by him to Sumati in 4,000 ; whilst the existing version of '*Menu's Code*' consists of but 2,685 verses. And thus, if there is any truth in this tradition,<sup>4</sup> there must have been at different times no less than four dif-

<sup>1</sup> This is very noticeable. See Mayne, § 77.

<sup>2</sup> In the correct *Arsha* form of marriage, the father receives a pair or two pairs of oxen. See Wilson's *Glossary*.

<sup>3</sup> Fa Hian (chap. xxx.) shows that Buddha made a law against suicide, as the monks were committing the offence.

<sup>4</sup> There can hardly be very much. Long compositions in verse of an infant people grow out of small beginnings, rather than dwindle from compositions immensely longer.

ferent metrical redactions of an original prose work, in all probability the lost *Dharma-Sûtra* of the *Mânavâ* sect, whose *Kalpa-* and *Grihiya-Sûtras* still survive. If there have been four versions of this work, it is a question which of them should be considered the more authoritative, and particularly whether the existing version should be considered to be relatively of any value. Weber says of it that it is a mere fragment of a metrical redaction of a *Dharmasûtra*, which redaction must have been recast, perhaps repeatedly. And V. N. Mandlik says there is little to connect the present imperfect Manu *Smṛiti*, which seems to have drawn more or less (like all the *Smṛitis*) from the *Mahâbhârata*, with the old *Mânava dharmasâstra*. See his introduction to the *Vyavahâ Mayûkha*, &c., p. xlvii. But a more interesting, if not a more important, question is, how long a time must have elapsed between the first and the last of these redactions? For, if the first of them, as suggested above, was made many centuries after the reign of Chandragupta, the last of them would seem to be referrible only to a comparatively modern era. It is observable indeed that, according to Weber,<sup>1</sup> the text of '*Menu's Code*' was taken to Java many ages since, as being the oldest of the then existing texts of *Dharmaśâstras*. But, if Java possesses that text now, it does not follow that what was taken to Java many ages since was that particular text. We know that the so-called *Code of Menu* now treated as law in Burmah differs so considerably from our *Code of Menu*, that it could

<sup>1</sup> *Hist. Ind. Lit.*, p. 280.



hardly be an adaptation of our Code : and it is within the bounds of possibility that the text current in Java, if it is not now, once was as different from our text as is that now current in Burmah. Further information is very necessary upon this point, particularly when it is remembered that the name '*Manu*' is attributed to many individuals, real and imaginary, and that both a *Vriddha* and a *Brihan* '*Manu*' are directly quoted in the commentaries.<sup>1</sup>

It is exceedingly dangerous to guess about these matters, but it is difficult to resist the temptation of hazarding a prediction that the earliest metrical redaction of the '*Code of Menu*' will be shown hereafter not to have been made until the power of Buddhism had been completely broken in India proper, and Brahmanism had recovered (or gained ?) a complete ascendancy. My excuse for making this guess must be the striking and most valuable picture of Indian society contained in the memoirs of the great Chinese traveller Hiouen Thsang, as rendered by M. Stanislaus Julien in his *Voyages des Pèlerins Bouddhistes*. Hiouen Thsang travelled over most parts of India, in the middle of the seventh century of our era, for the purpose of visiting Buddhist shrines, temples and holy places, and thoroughly examining the teachings of the faith, and he noted down as he went along whatever he found of interest. Thus he recorded the fact that Palibothra was in ruins, whereas Fa Hian, another Buddhist traveller, who visited the city at the be-

<sup>1</sup> See Weber, *ubi supra*; and V. N. Mandlik, Introduction, *Hindū Law*, xlvii.

ginning of the 5th century of our era, remarked that it was then in a most flourishing state. On the other hand, the later traveller seems to have worked his way down south as far as Conjeveram<sup>1</sup> without great difficulty ; whereas the earlier traveller failed to penetrate into the Deccan, because 'the country was precipitous and the roads dangerous and difficult to find.' One of the first noteworthy statements of Hiouen Thsang is to the effect that whilst every country in India had its own proper name, the most general name was that of the '*Kingdom of the Brahmans*,'<sup>2</sup> given with reference to the 'most pure and noble of the classes' to the country known as Central India, which appears to have coincided approximately with the *Madhya Deśa*<sup>3</sup> of the *Śāstras*. In that country the language spoken was 'clear and pure,' and the excellent morals of the people corresponded with its language, whereas the natives on the frontiers were

<sup>1</sup> It does not appear why the great traveller went no farther south than *Kañjipuram* (Conjeveram). Perhaps it was because he found the Telugu and Tamil countries full (so he tells us) of *Digambara* (Jain) heretics. It is observable that he says nothing about Brahmans in the South.

<sup>2</sup> It is observable that whilst Manu (ii. 17-21) calls the country between the mountains (Himalayas and Vindhya) and the ocean the 'Ārya country,' Hiouen Thsang calls it the 'Brahman kingdom.' The *Damathat* (Burmese '*laws of Menu*') prescribes oaths for nine classes of Brahmans, including *Kshattriyas*, traders, *Viśas*, and *Chandālas*! In Megasthenes (uncertain Fragment lvi.) the name '*Brahmans*' is represented as being common to many distinct nations, one of which was the *Maccocalinga* (of Orissa?). Can it be that for a long time the Āryan immigrants all called themselves Brahmans, and the practical division of the people into four classes is of a recent era? The myth of Manu and Idā in Muir's *Sanskrit Texts*, i. 182, says nothing about the 'four classes.'

<sup>3</sup> According to Manu (ii. 17-21) this was bounded by Allahabad, the Himalayas, the Vindhya, and the *Vinaśena*.

impure alike in language and in manners, having foolishly indulged their own evil passions. Heretics of divers sects attached themselves each to his own master, and by different routes pressed on all to the same goal. There were four pure classes of people, to wit, *Brahmans*, *Kshattriyas*, *Vaiśyas*, and *Śūdras*. Of these, the first was distinguished by a spotless purity of life. The *Kshattriyas*<sup>1</sup> were 'the royal race,' who occupied the throne and applied themselves to the exercise of humanity and pity: they were respected, though their dynasty had been founded by usurpation, after the murder of the rightful king. I imagine that reference may be made here to the traditional fact that the above-mentioned Chandragupta, a Mauryan<sup>2</sup> adventurer, made himself king by slaying the then lord of Central India. The *Vaiśyas*<sup>3</sup> were keen merchants, given up to the love of lucre. The *Śūdras*<sup>4</sup> were labourers, and worked at husbandry. With regard to the effect of caste, the following observation<sup>5</sup> is of great importance as showing how ter-

<sup>1</sup> See the note at p. 26 to 'fighting men.'

<sup>2</sup> Possibly this name is to be connected with the now famous Merv.

<sup>3</sup> This class of keen merchants was unknown to Megasthenes (see p. 26, above). According to Weber (as will be seen below), the name '*Vīśas*' applied originally to the Āryan settlers on the banks of the Indus generally, and therefore it is difficult to understand how it can have come to mean 'merchant.' One would expect it to mean rather 'shepherd and husbandman;' and, according to Manu (ix. 326-7), the proper business of a *Vaiśya* was to tend herds and flocks and sow seeds, and trade, presumably in cattle and agricultural produce and money.

<sup>4</sup> It does not appear from Hiouen Thsang who were the soldiers of his day. I presume the *Śūdras* were. It was they who filled the ranks of the infantry when Tavernier travelled in the seventeenth century. He speaks well of their courage.

<sup>5</sup> At p. 80, vol. ii.

ribly the system has hardened in these latter times : ' Dans ces quatre familles, la pureté ou l'impureté de la caste assigne à chacun une place séparée. Quand les hommes ou les femmes se marient, ils prennent un rang élevé ou restent dans une condition obscure, suivant la différence de leur origine. Les parents du mari ou de la femme ne peuvent se mêler ensemble par ses mariages.' I infer from this passage, one not altogether free from ambiguity, that mixed marriages of all kinds were then quite proper and common, though no person could better his or her social position and rank by marriage. After the four classes came the other families of India, ' forming numerous classes, which, following their condition, associate and marry amongst themselves,' that is to say, outsiders could intermarry only with outsiders, not with members of the four pure classes. Of the morality of the people of Central India generally Hiouen Thsang speaks, like Megasthenes, in terms of the highest praise. Fraud and deceit were unknown to them, the desire of wealth was no inducement to do wrong ; they feared the punishments of another life, and confirmed their promises by oaths. In all things uprightness and honesty of character marked their acts. Again, uprightness was the dominant trait of the administration. The wicked were punished very lightly, generally by fine. Hardened offenders and rebels were shut up for life in a prison, but were not punished corporally. But if any ' violated the rites and justice,' or was found wanting in ' fidelity or filial piety,' they would cut off his nose or ears or per-

haps his hands or feet. In some cases a malefactor was expelled the kingdom,<sup>1</sup> or 'exiled among the barbarians on the frontiers.' Torture was not used, except to get evidence, when ordeals<sup>2</sup> by water, fire, weighing, or poison were resorted to. Every man cultivated his own hereditary lands,<sup>3</sup> borrowing seed if he wanted it from the royal granaries, and paying a tax of one-sixth. Merchants went and came without interruption, paying slight customs. With regard to food and drink, rice and wheat were the principal crops, and fish, mutton, and venison were served at all times in quarters or slices; but the law forbade the eating of beef, ass' flesh, pork, and other unclean meats, and any who ate such was outcasted. Several kinds of wines and liquors were in use, some being proper to one class and some to another. Thus 'Cramanas and Brahmans drank the juice of the grape or that of the sugar-cane, which differed altogether from that of distilled wine,' whereas *Vaiśyas* drank a strong liquor made from fermented grain, and *Kshatriyas* had their own drinks made from grapes and

<sup>1</sup> The Delhi *Iti* (west compartment) shows that Aśoka abolished capital punishment, and substituted banishment therefor.

<sup>2</sup> Dubois' paper in the Madras *Lit. Soc. Trans.*, Part I., p. 108, gives these four as the principal ordeals, mentions several others commonly practised, and speaks of the great injury done by them, particularly to virtuous wives. Manu (viii. 114) speaks of ordeals (1) by fire and (2) by water, and (3) by touching the heads of wife and children. According to Bṛhaspati weighing is the first of nine ordeals. And confer Daniel v. 27: 'Thou art weighed in the balances, and thou art found wanting.' The subject is treated of in Macnaghten's *Hindoo Law*, pp. 460 et seq. Yājñavalkya describes five ordeals. Confer also *Supp. Vols.*, Jones' Works, i. 172; and Steele's *Hindoo Castes*.

<sup>3</sup> Compare this with what Megasthenes says. See note 3 to p. 26, above.

sugar-cane. What a change, then, had taken place since Fa Hian wrote<sup>1</sup> in 404–415 A.D. : ‘The people of this country kill no living creature nor do they drink intoxicating liquors. And, with the exception of the Chandālas, they eat neither garlic nor onions. The word “chandāla”<sup>2</sup> signifies a wicked man, who lives apart from others.’

Hiouen Thsang’s memoirs show pretty clearly that although Central India was under the supremacy of the great Buddhist king of *Kanyâ-Kubja*, *Çilāditya*, who had subdued all the neighbouring kingdoms with the sole exception of that of the invincible Mahrattas, and although cities like Malwâ and Magadhâ were strongholds of Buddhism, Brahmanism nevertheless had become very powerful,<sup>3</sup> so much so that a number of Brahmans ventured to conspire against the King and attempt his life in open daylight on a public occasion on which Hiouen Thsang was present, and many great cities, notably Benares and *Prayâga*, were almost exclusively Brahman. It is not impossible, therefore, that Buddhism may have been almost

<sup>1</sup> Beal, p. 55.

<sup>2</sup> A curious explanation of the origin of this term is given in the *Damathat*, or Burmese ‘*Laws of Menu*’ (Richardson, p. 129). A young Brahman murdered his wife. His fellows consulted together as to how a crime so enormous should be punished. They shaved his head, turned him out of caste, and called him ‘*Chanddla*.’ From that date the most wicked, incorrigible Brahmans bore that name.

<sup>3</sup> That is, comparatively. Fa Hian (chap. xvi) shows that in his time, early in the fifth century, the ascendancy of the Buddhist clergy was so great that kings dared not recline in their presence; and it had always been thus from Buddha’s time! Buddhism was then in full vigour in Central India. Whether it existed in South India Fa Hian does not say; he was unable to penetrate to the south, owing to the wild state of the country.

completely extinguished in Central India by the end of the seventh or the middle of the eighth century. But, on the other hand, in the existing state of knowledge it would be rash to assume anything of the kind, seeing that the very partial successes of the Mahomedans at the beginning of the eighth century were abruptly brought to a close and the foreigners expelled in 714 A.D.;<sup>1</sup> and when Mahmûd made his unexpected and successful swoop upon Canouj (*Kanyâ-Kubja*) in 1017 A.D., the invaders were struck with astonishment at the size and magnificence of that capital, with its thousand grand edifices and innumerable temples, and Mahmûd forbore from injuring it, probably from prudential motives.<sup>2</sup> If, as seems probable, the 'thousand edifices as firm as the faith of the faithful, most of them of marble,' noticed by Mahmûd may be identified with the hundred Buddhist convents of Canouj mentioned by Hiouen Thsang, Buddhism must have continued to exist and be powerful in Central India during part of the eleventh century.

Looking to the facts noticed above, and to the plain object of the '*Code of Menu*,' which was to achieve the glorification of the Brahman class at the expense of all other classes of society, I cannot help suspecting that orientalists will agree hereafter in referring the date of the earliest metrical redaction of the work so styled to an era posterior to the decline and fall of Buddhism in Central India,<sup>3</sup> and the date

<sup>1</sup> See Briggs's *Ferishta*, iv. p. 411.

<sup>2</sup> *Ibid.*

<sup>3</sup> Since writing the above, I have been informed by Doctor Burnell that good evidence is forthcoming to show that the date of this work

of the existing redaction to a still later era, perhaps that of the rise of the great *Vijayanagara* power in the fourteenth century, which was accompanied by a temporary revival of Hindû learning, particularly in the department of law. And I should not be surprised to learn that our existing text, whilst studded no doubt with ancient verses and authoritative extracts, contains a large admixture of spurious matter,<sup>1</sup> cunningly interpolated for the aggrandisement of the Brahman interest. Forgeries for sectarian purposes are said to be common enough in Sanskrit literature. And respectable writers have not hesitated to supply wants when commenting on sacred books: as, for example, Mâdhava, who, in his commentary on the *Parâśara Smṛiti*, appears to have introduced a legal treatise of his own composition in lieu of the missing section on *vyavahâra*.

So much for the '*Code of Menu*.' Orientalists appear to agree that the *Dharmaśâstra* bearing the name of *Yâjñavalkya* is second<sup>2</sup> to the *Mânava D. S.* alike in antiquity and in importance; and it is necessary, therefore, that inquiry should be made as to the origin, age, aim, and matter of this famous work.

When the *Yâjñavalkya Smṛiti* or *Dharma-Śâstra*

cannot have been prior to about 400 A.D.; whilst its language and form are (relatively) so modern that it may have been composed much later. The aim of the work now appears to have been to render more intelligible the *Mânava* teachings. And its genesis probably is to be referred to the Court of a *Châlûkyas* sovereign in the Deccan, who claimed to be a *Mânava*.

<sup>1</sup> Thus, for example, Chap. viii. 1-14, giving the eighteen topics of law, is not found in Medhâtithi's Commentary, and therefore presumably is an interpolation later than 1000 A.D.

<sup>2</sup> V. N. Mandlik's Introd. *Hindû Law*, li., places the Y. D. S. after Manu, Vasishtha, Gautama, Śaṅkha, Likhita, and Hârîta.



is mentioned, it is but natural to suppose that the work is to be attributed to the great sage already spoken of as having proclaimed the 'white *Yajur Veda*.' But Max Müller tells us<sup>1</sup> that : 'The versifier of these laws is as distinct from the original Yâjñavalkya as the poetical editor of the laws of the *Mānavas* is from the mythic Manu, the founder of the *Mānava Śākhâ*,' and that he has falsely described himself as the author of the *Āraṇyaka*. If this is so, great caution would seem to be needed in accepting as authoritative in any degree, or for any purpose, a work which is the basis of the '*paramount authority*' on succession and inheritance, the now celebrated *Mitâkharâ*. At the beginning of the *Yâjñavalkya-Smṛiti* is given a list of twenty 'propounders' of *Dharmaśāstras*, one of whom is Yâjñavalkya, and the question arises, who is the author thus referred to ? I observe that Bühler suggests<sup>2</sup> that it is possible to guess to what school the original *Yâjñavalkya Dharmaśāstra* belonged, viz., to the *Vâjasaneyi Śākhâ* of the white '*Yajur-Veda*.' And Max Müller appears to consider it certain that the original Yâjñavalkya either actually composed or collected the sacred code of the *Vâjasaneyins*, i.e. the *V. Brâhmaṇa Upanishad*, when he seceded from the ancient school of the *Adhvaryus*, and founded the new or '*white Yajur-Veda*.' It is possible, therefore, that the author referred to at the beginning of the *Yâjñavalkya-Smṛiti* was the original Yâjñavalkya himself, or a follower of a school established by him, and that the redaction which now goes by the name

<sup>1</sup> *Ancient Sans. Lit.*, p. 330.

<sup>2</sup> Introduction to *Digest*, xxx-i.

of 'Yajnavalkya's Code' in fact is connected with the labours of the original Yâjñavalkya, the sage. Now, that sage certainly was a seceder from the established order of things, and according to Weber<sup>1</sup> he virtually is described in the *Mahâ-Bhârata* as a Buddhist teacher, and is regarded as a main originator of the *Yoga* doctrine. Further Max Müller states<sup>2</sup> that Yâjñavalkya proclaimed the 'white *Yajur-Veda*,' of which the *mantras* are collected under the title of the '*saṁhita* of the *Vâjasaneyins*,' whilst Weber informs us, at p. 110, that the 16th book of that *saṁhita* is regarded as an *upanishad* and the principal book of the Śaiva sect. And to that sect belong the *Yogîs* or adherents of the *yoga* school of philosophy, a school which is materialistic and closely allied to the atheistic school called the *Sāṅkhya*. Apparently, therefore, there are good grounds at present for supposing that the '*Code of Yajnavalkya*' owes its first beginning to the sacred code of a body of possibly Buddhistic schismatics, whose legitimate descendants are a probably atheistic subdivision of the Śaiva sect. If this is really the case, it would seem to be simply impossible to adhere to the belief that the so-called '*Code of Yajnavalkya*' contains laws binding on the consciences of ordinary modern Brahmans of South India.<sup>3</sup> With regard to

<sup>1</sup> *Ind. Lit.*, p. 237.

<sup>2</sup> *Ancient Sans. Lit.*, p. 349.

<sup>3</sup> V. N. Mandlik (Introd. *Hindû Law*, li.) says of the *Y. Smṛiti* that it does not seem to have at any time formed the distinctive basis of the Âryan law, 'but as bearing the impress of the leading exponent of the doctrines of the White *Yajur-Veda*, it formed the principal guide of the fifteen Śâkhâs of that *Veda*. These Śâkhâs, as we find from the *Charana Vyâha* and other authorities, have chiefly predominated in the countries to the north of the *Narmadâ*. And hence the greater prevalence of

Yâjñavalkya's connection with the *yoga* philosophy, I may observe, by the way, that he is styled in the second verse of the portion of the *Yâjñavalkya-Smṛiti* the 'Lord of Yogis'; and in the first verse of the *Mitâkharâ*, the '*Yogamûrti*,' upon which Bâlabhattacharya remarks that the saint is known as *Yogîśvara*. Moreover the author of the *Mitâkharâ* himself is well known by the name of *Vijñâna Yogî*.

It is a noteworthy thing that the '*Code of Yajnavalkya*' begins with the statement that the *Munis* or sages asked Yâjñavalkya, 'resident of *Mithilâ*,' to reveal the duties of the classes, orders, and the mixed; and that, so asked, the saint is represented to have told the *munis* the rules of duty for the 'country of the black antelope,' and immediately afterwards to have enumerated to them twenty existing *Dharmaśâstras*. If Yâjñavalkya was teaching *Yoga* doctrines at *Mithilâ*, a place renowned for its independence of thought, when twenty *Dharmaśâstras* had already been published, one would suppose that the object of the *Munis* in asking him to teach them *Dharma*<sup>1</sup> (duty)

Yâjñavalkya's doctrines amongst the followers of these Śâkhâs in the Northern courts, where there have been Vâjasaneyi priests. The Vâjasaneyins claim Yâjñavalkya as their great *Āchârya*.'

<sup>1</sup> This mysterious word has been greatly misunderstood. It would seem to be connected with a root signifying to 'hold,' and possibly may mean the inherent magic efficacy of acts, that holds up a man in his progress through life. *Dharma* is not at all comparable with our '*virtue*' (manliness), or with our '*duty*'; still less does it resemble our '*law*.' According to Haradatta (see Max Müller, *An. Sans. Lit.*, 101), '*dharma* (virtue) is the quality of the individual self, which arises from action, leads to happiness and final beatitude, and is called *apûrva*, supernatural.' According to Nârada, in the good old times men conformed themselves to *dharma* alone, and then there was no room for *vyavahâra*, or mere ordinary business. When the corruption of morals bred avarice,

could only have been to elicit from him new doctrines accordant with the *yoga* system. And what he then taught them professed to be suitable and proper, not for all men, but for such as dwelt 'in the country of the black antelope,' which <sup>1</sup> appears to mean a small portion of the *Bramhârshi* (or Brahman's land), supposed to be peculiarly adapted to the performance of sacrifices. In other words, the *Yâjñavalkya Smṛiti* professes to be written for the edification of pious Brahman, just as '*Menu's Code*' <sup>2</sup> claims to be capable of being properly studied by him 'whose life is regulated by holy texts, from his conception even to his funeral pyre,' *i.e.*, the pious Brahman ; but by no other man whatsoever.

It is generally assumed, and apparently upon very good and sufficient data,<sup>3</sup> that the existing '*Code of Yajnavalkya*' is of a later date than the existing '*Code of Menu*.' And as regards its value to the jurist, Roer observes : 'Yâjñavalkya is second in importance to Manu alone ; and, with the commentary, is the leading authority of the Mithila School.' But Burnell informs us <sup>4</sup> that to the period of eclectic pantheism introduced by Śankara and Râmânûja 'belong most of the versified Smṛitis with the exception of an old

hatred, and the like, *vyavahâra* necessarily came into existence. See V. N. Mandlik, *Introd. Hindû Law*, lxx.

<sup>1</sup> See *Manu*, ii. 23.

<sup>2</sup> See ii. 16.

<sup>3</sup> For example, Y. contains several important provisions respecting accidents, &c., 'which mark a period of progress, and form a great contrast to the general tone of the Dharmaśāstras.' Burnell, *Introduction to the Sāmavedhānabrāhmaṇa*, xviii.

<sup>4</sup> *Introduction to the Dāya Vibhāga*, p. viii.

verse, which now and then presents a strange contrast to the diffuse modern slokas. Such are the Pitāmaha, Prajâpati, Mârkandeya, Yama, and Vyâsa Smṛitis, and others of which the names are inexplicable, except by the supposition that they are the results of Śan-kara's teaching.' And further on he observes : 'It seems probable that most of these works were reduced into their present form before the great commentators of the tenth century, as many are quoted from much the same text as still exists, though some verses cannot be found. There are the later Smṛitis, but they are clearly forgeries to serve sectarian purposes.' The observation occurs therefore that if some *Smṛitis* 'clearly are forgeries,' it may very reasonably be suspected that other *Smṛitis*, as yet imperfectly examined and tested by the cunning antiquary, may also be forgeries ; and that the two so-called '*Codes*' above noticed, or one of them, may eventually turn out to be of the number of pious frauds put forward to serve sectarian or other purposes. Why should they not be such ? That able and energetic minister, Mâdhava, thought proper in the last half of the fourteenth century to publish a commentary in three sections on the *Parâśara Smṛiti* ; and since unfortunately the text of that work extended to only two sections, leaving *vyavahâra* (civil law or justice) untouched,<sup>1</sup> the commentator felt himself obliged to supply the want out of his own resources, and accordingly produced as his third

<sup>1</sup> See V. N. Mandlik (*Hindû Law*, 310) as to this. Parâśara appears to have been the last of the *Smṛiti* writers, and perhaps considered the *vyavahâra* of Manu and the rest to be no longer suited to the needs of the people.

section a treatise of his own, which is said to be an abridgment of the *Mitâkharâ*, but in which he only once mentions *Vijñāneśvara* by name.<sup>1</sup> Why should not '*Menu's Code*' have been composed in some similar fashion, say eight or ten centuries ago? I have not yet heard of the existence of any indisputable authority for the proposition that '*Menu's Code*,' in the form in which Sir William Jones had it when he did it into English, or in a form nearly resembling that form, existed so many as 500 years back; and if one chooses to deny the genuineness and authority of that work, the burden of proof will lie on the shoulders of those who choose to affirm the same.<sup>2</sup> I have been at some pains to discover the foundations upon which rest the fame and pre-eminence of '*Menu's Code*,' and, far from finding them, have come across a great mass of negative evidence, amply sufficient in itself to convince an ordinary mind that, before Sir William Jones laid his golden egg in the shape of his '*Code*,' and solemnly cackled and pothered over it,<sup>3</sup> not a single European or other foreigner had ever been so fortunate as to hear a whisper about the original that came into the translator's hands. Of course Megasthenes knew nothing about it. Fa Hian complains<sup>4</sup> that he travelled all over Northern India without finding any written works, and says plainly that the people of

<sup>1</sup> See Burnell's Introduction, *Dāya Vibhāga*, p. xii.

<sup>2</sup> I must not be understood to question the authority in early times of a mythic '*Menu*.' That is another matter.

<sup>3</sup> The translation was published in 1794, and again in 1796; and it was reprinted by Haughton in 1825.

<sup>4</sup> In Chapter xvi.

Central India had neither magistrates nor laws—‘to govern them the King required not the apparatus of punishments.’<sup>1</sup> Hiouen Thsang describes the studies of Brahmans, but apparently is not aware of the existence of any work on law and jurisprudence. Marco Polo and the early European travellers either are silent about the matter, or, as not infrequently happens, explicitly state that the Indians have no laws.<sup>2</sup> And hence it was that that great discoverer, Anquetil Duperron,<sup>3</sup> thought fit to express his thanks to Lord Hastings and Mr. Halhed for having shown the world that the Indians indeed possessed laws, after ‘Bernier and Father Bouchet’<sup>4</sup> had said it, and people have always represented<sup>5</sup> in Europe those people

<sup>1</sup> Compare with this the short and vague list of crimes declared by the *Sāmaśidhānabrāhmaṇa* to call for expiation (not punishment), and Burnell’s remarks thereon in his introduction to that work. No doubt the great development in the criminal law evidenced by the *Smṛitis* took place in an age considerably posterior to Fa Hian’s.

<sup>2</sup> Confer Orme, *Mil. Trans. India*, p. 25: ‘Intelligent enquirers assert that that there are no written laws amongst the Indians, but that a few maxims transmitted by tradition supply the place of such a code in the discussion of civil causes; and that the ancient practice, corrected on particular occasions by the good sense of the judge, decides absolutely in criminal ones.’ As to these ‘maxims,’ see what is written below. On the other hand, Camoëns in 1572 remarked that ‘the Devil had written laws for the Indians.’ *Os lusíadas*, x. st. 108. What did he allude to?

<sup>3</sup> *Leg. Orient.*, p. 311.

<sup>4</sup> See the Index, below. Duperron also quotes Dow as denying laws to India.

<sup>5</sup> For example, P. Van den Broeck, who lived six years at the beginning of the seventeenth century on the Coromandel coast, and declared (see Renneville, *Voyages*, ed. 1725, vii. 517), ‘Je n’ai pu découvrir qu’ils eussent aucune Loi écrite, ni aucune Tribunal pour les affaires Criminelles.’ As regards their having no tribunals, compare Maine’s *Village Communities*, p. 71: ‘Though the Brahminical written law assumes the existence of king and judge, yet at the present moment, in some of the best governed semi-independent states, there are no institutions corre-

as subject, as of right, to an arbitrary despotism.' Anquetil Duperron had been most anxious during his stay in the East Indies to find some Indian laws, of whatever kind ; but the sole fruit of his labours had been the (supposed) discovery that *Vijñâneśvarudu* was the name of a Telugu king, ' who had collected the laws of which is composed the book of right.'<sup>1</sup> The Telugu language, he explains, calls the science of right *Vijñâna*. Have we a hint here as to the origin of the *Mitâxarâ* ? I shall remark on these observations by and by, in discussing the question of the authority of that work. In the meantime I must pass on to the consideration of the second topic of inquiry, though I should prefer first to say a few words about a few questions such as whether the *Āpastamba Sûtra* had its genesis in South India, what was the authority of Gautama, and the like.

sponding to our courts of justice.' But (he goes on to say) civil disputes are disposed of by the elders of village communities, and criminal matters by soldiers.

<sup>1</sup> At *Leg. Orient.*, p. 92.



## CHAPTER III.

*Differences between the Smritis—Practices in the North and in the South—Drinking spirits—Āpastamba's puritan, Baudhāyana's tolerant, doctrines—Marriage, primogeniture, unequal shares, &c.—Strīdhana—Conflict of authorities—The roots of the law—How the King should decide disputes—Gautama—Adherence to a Charaṇa—The quasi-laws of the Charaṇas—Have they ceased to operate?—Dharmā—Traces of it in Marco Polo—The origin of the Charaṇas—Surviving Dharmasūtras—Difference between Kulas and Charaṇas—The Śākhās—The 'black' and 'white' Yajur-Vedas—The Codes of Menu and Yajñavalkya—Following the rules of another Śākhā—Gautama—The Āpastambiyas—The Mānavadharmasūtra lost—Yājñavalkya's Code propounded in Mithilā—The rashness of Colebrooke's assertions about the Mithilā—The Abbé Dubois—The White Yajur-Veda—The Saiva Āgamas—The Lingayets.*

THE second topic is the following, namely : —

(2) *Upon what points, and to what extent, do the existing Dharmasāstras differ from one another? The writers of the modern so-called digests failed in their endeavours to bring everything into harmony. Would it be possible for others by any method to reconcile the differences in the Smritis? Or do the ancient works represent different laws administered to different clans?*

Burnell tells us in the Introduction to his *Dāya-vibhāga*, p. xiii., that 'A great difference between the original Smritis is apparent, and this in accordance with the differences between the Brahmanical śākhās in other respects.' Clearly, therefore, it behoves the

student of Hindû law carefully to note, compare, and classify the differences between the existing *Smṛitis*, and particularly to ascertain, if possible, what doctrines were originally received by the Ārya families resident in that part of India to which his experience is principally confined. Thus, for example, Baudhâya declares<sup>1</sup> that disputes exist with regard to certain practices both in the North and in the South ; that it is lawful in the North to deal in wool, drink spirits, sell animals that have teeth in the upper and in the lower jaw, and to follow the trade of arms, and to go to sea ; that he who follows any of these practices in a country where the rule is not to follow them commits sin, but for each of them the rule of the country should be considered the authority ; but that Gautama declares that that is false. And if we turn to Gautama (XI., 20) we shall find that 'the laws of countries, castes, and families, which are not opposed to the (sacred) records, have also authority,' from which it may be inferred that customs which are opposed to such records are bad. With regard to the custom of drinking spirits, we have already seen that in Hiouen Thsang's time all classes habitually drank fermented liquors in Central India, though '*Menu's Code*' declares that even to smell spirits is a crime,<sup>2</sup> whilst to taste them is a sin on a par with that of slaying a Brahman or stealing gold

<sup>1</sup> *Dh.* I. i. 17-24.

<sup>2</sup> Earlier works (e.g. the *Sāmavidhānabrāhmaṇa*, i. 5, 15) declare the drinking of ardent spirits to be one of the greatest of sins. But Manu is inconsistent upon this point, as upon so many points.

from a priest, and cannot be expiated. And the other bad practices enumerated above doubtless were followed at that time in the same part of India. Gautama, therefore, can hardly have been a great authority in Central India when Hiouen Thsang wrote. Was he at any time ? From Bühler's Introduction to Gautama<sup>1</sup> we may gather that in all probability the *Gautama Dharma-Śāstra* was originally studied by the Chândogas alone, and was the text-book of the *Gautama Charaṇa*. Brihaspati differs from Gautama in enumerating without disapproval various customs peculiar to the North or South, *e.g.*, the drinking of spirits, eating fish, and the like. Far from disapproving of them he remarks philosophically : ' Those *Dharmas* of countries, castes, and tribes which are practised by them, they are thus to be preserved ; otherwise people are agitated.' See my *View of the Hindoo Law*, p. 115 *et seq.*

It appears from Bühler's Introduction to *Āpastamba*,<sup>2</sup> that that author in several cases holds puritan doctrines which are opposed to the older and more tolerant doctrines of teachers like Baudhâyana. He denies, for example, the legality of affiliating substituted sons and of appointing widows. According to his view the legitimate son alone may inherit his father's estate, and follow the occupation of his caste ; and, whilst silent about the ' twelve kinds of sons,' he explicitly forbids the sale and gift of children. Further, he restricts the number of lawful marriages,

<sup>1</sup> *Sacred Laws of the Aryas*, vol. ii.

<sup>2</sup> *Ibid.*

and altogether omits from his list the wedding by fraud, *Paiśâcha-Vivâha*.<sup>1</sup>

With respect to the distribution of the family wealth, Âpastamba gives it as his own opinion that the father should divide his effects equally amongst the sons, 'after having gladdened the eldest son by some (choice portion) of his wealth,' that is to say, after making him a good present by way of distinction. At the same time he notices the opinions of 'others,' and particularly the opinion of those who allow the eldest son alone to inherit. This practice, he says, is opposed to the Vedas, inasmuch as 'Manu divided his wealth among his sons,' and no difference in the treatment of the eldest son is prescribed; at the same time he admits the existence of the text 'they distinguish the eldest son by (a large portion of) the heritage,' but contends that it is merely a statement of fact, not an injunction. Baudhâyana, on the other hand, allows three several methods of distribution, and takes the text last quoted to be an injunction. Gautama again speaks of additional shares being given to the eldest, middlemost, and youngest sons, and the revenue being equally divided amongst all. Then he goes on to say, 'Or let the eldest have two shares, and the rest one each.' Next he permits a strange mode of selection by seniority. Lastly he sanctions the adjustment of special shares in each class of sons according to their mothers.

<sup>1</sup> Mayne (§ 76) says of this simple form of marriage that it 'is more like the sudden lust of the ourang-outang than anything human.' But confer the ravishment of Dinah, Gen. xxxiv.

It is to be remarked that whilst Yājñavalkya and many others specifically allow a share to the mother on partition, according to Gautama the sons alone shall divide the estate. And Âpastamba appears to imply the same, since he explicitly declares that the lawfully begotten sons are entitled to equal shares of the wealth of both parents, and says nothing about the mother taking a share, though he declares that the daughter may take the inheritance in default of sons, or perhaps (as Haradatta will have it) in default of pupils.

Another important point upon which the *Śâstras* seem to differ very greatly is the nature of the woman's peculiar property, *Strîdhana*. Thus, whilst *Manu* and others restrict it to six specified kinds of property, others take a most liberal view of what should be included in the term. Kâtyâyana for example says, 'The wealth which is earned by mechanical arts, or which is received through affection from any other (but the kindred), is always subject to her husband's dominion. The rest is pronounced to be the woman's property.'

Other differences it is unnecessary to notice. I must pass on to a consideration of what some of the *Dharmaśâstras* themselves say about these differences generally. Yājñavalkya declares that, 'If two texts of the law be opposed to each other, an argument founded on usage is of force; but the *Dharmaśâstra* is of greater force than the *Arthaśâstra*.<sup>1</sup> This is a

<sup>1</sup> *Artha* means, according to Roer and Weber, respectively, ethics and technical arts; whilst Julien (*Voyages des Pél. Boud.*, ii. 159) makes the word to mean, 'la connaissance distincte du sens.'

settled rule.' This corresponds very nearly with the declaration at the opening of the *Institutes of Gautama*: 'The Veda is the source of the sacred law, and the tradition and practice of those who know the (Veda). Transgression of law and violence are observed (in the case) of (those) great (men); but both are without force (as precedents) on account of the weakness of the men of later ages. If (authorities) of equal force are conflicting, (either may be followed at) pleasure.' Āpastamba begins by announcing the intention to 'declare the acts productive of merit which form part of the customs of daily life, as they have been settled by the agreement (of those who know the law). The authority (for these duties) is the agreement of those who know the law, (and the authorities for the latter are) the Vedas alone.' And similarly *Manu* tells us that the roots of the law are: (1), the whole Veda; (2), the ordinances and moral practices of such as understand it; (3), the immemorial customs of good men; and (4), self-satisfaction. Looking at these declarations together, I think there can be but little doubt as to their meaning, which seems to me to be this: men must look for obligatory rules of conduct to the duly recorded usages that the good men of old have agreed to follow. Upon certain points of conduct, however, the good men of old will be found to have held different and inconsistent opinions, and, where this is the case, men will be warranted in following the current usage of the good men of their own time and place. For law is the custom of good men, handed down from father

to son, and is not to be found written down in particular texts.

That all men are not to be judged by one and the same rule may be seen from a number of passages<sup>1</sup> in the so-called '*Codes*'; but perhaps nowhere is the principle more clearly and forcibly laid down than in Gautama, xi. 12-22 : 'His administration of justice (shall be regulated by) the Veda, the Angas, and the Purana. The laws of countries, castes, and families, which are not opposed to the (sacred) records, (have) also authority. Cultivators, traders, herdsmen, money-lenders, and artizans (have authority to lay down rules) for their respective classes. Having learned the (state of) affairs from those who (in each class) have authority (to speak, he shall give) the legal decision.' That is to say, the King must pronounce the legal decision in ordinary cases arising between non-Brahmans, after learning what are the customs of the community to which the disputants belong, from the lips of the heads of that community. Where the information so derived is unsatisfactory, and the question hard to resolve, he is to have recourse to assessors noted for general learning. 'He shall learn (the truth) from (Brahmanas) who are well versed in the threefold sacred lore, and give his decision (accordingly).' He shall not turn over the

<sup>1</sup> See, for example, Manu, viii. 41 : 'A king who knows the revealed law must inquire into the particular laws of classes, the laws of districts, the customs of traders, and the rules of certain families, and establish their peculiar laws.' A fortiori, 'before going into the wide, uncertain, and unexplored field of Hindû law, we ought to seek for the parties' customs,' as shown by V. N. Mandlik (*Hindu Law*, p. 438).

leaves of some sectarian treatise such as the *Mitâvarâ*, and decide in accordance with any isolated text that at the first blush may 'appear to be more or less applicable to the state of facts exhibited.

It is asserted by Bühler that the *Code* which contains these admirable directions for the guidance of the King in his judicial capacity, namely, the *Sûtra* '*Code of Gautama*,' may be 'safely declared to be the oldest of the existing works on the sacred law.' And yet, although it mentions by name but one single teacher on law, a Manu, its numerous references to the opposite opinions of '*some*,' prove conclusively that important differences between authorities had arisen before, possibly long before, the time of its publication, and many *Dharmasûtras* had preceded it. This being the position of Gautama as an authority, peculiar importance attaches to the announcement made in it, as we have seen above, that authorities of equal force, *e.g.*, *Dharmasûtras*, sometimes conflict, and where they do conflict, 'either may be followed at pleasure.' I understand this to mean, compendiously, that the existence of irreconcilable differences between authorities must be accepted as a fact, and in the case of such difference occasioning difficulty, men must elect between opposite teachers. But I take it that such election is to be made not often and lightly, but once and deliberately. That is to say, a man is not to follow this teacher to-day and that teacher to-morrow in accordance with the impulse of the moment; he is to attach himself once for all to a *Charana*, and consistently conform to its aggregate



of usages, religious, ethic, and legal.<sup>1</sup> What a *Charaṇa* is, or was, shortly will be discussed to some slight extent. It is to be observed that Burnell<sup>2</sup> asserts in unqualified terms that there is no reason to believe that the original *Smṛitis* do not represent the actual laws which were administered, whereas the modern so-called 'digests' (*Nibandhas*) were never intended to be actual codes of law. This is a very important assertion, and doubtless will be found hereafter to be very nearly correct. The *Dharma-sûtras*, possibly also the later *Dharmaśâstras*, embodied each an aggregate of usages to which all who joined or adhered to a particular company or religious fellowship, generally styled a *Charaṇa*, were obliged consistently to conform. These usages, though they were not commands of a sovereign or of a political superior, nevertheless closely resembled positive laws in that they were capable of being enforced, and doubtless in many instances actually were enforced, by all-sufficient sanctions at the disposal of the particular company or religious fellowship, one of which was permanent expulsion from caste. And the administration of these quasi-laws doubtless was carried out by the seniors or chiefs of the *Charaṇa*, quite independently for the most part of the authority of the King.<sup>3</sup>

<sup>1</sup> Compare the *Dattakamīmāṃsā* (sec. v. 42), which begins thus: 'Baudhâyaṇa propounds a particular rule for those following the *Taittiri* portion of the Vedas.'

<sup>2</sup> Introduction to the *Dâyavibhāga*, p. xiii.

<sup>3</sup> See Burnell's Introduction to the *Sāmavidhānabrâhmana* for very interesting remarks on the 'sins' and 'crimes' enumerated, but not at all distinguished, in that early work. It seems that in the Fetish age

If these assumptions are correct, or even approximately correct, the question naturally arises, when did the quasi-laws of the different *Charanas* become obsolete? Have they indeed even yet wholly ceased to operate? The general ignorance as to the customs of the people of this country is so wide and deep that one need not hesitate to disregard as simply valueless all time-honoured beliefs as to what Brahmans do or do not. And when we are told that all Hindûs belong to one or other of some four or five '*schools of law*,' and that this modern speculative treatise is the '*paramount authority*' for one large local area, and that for another, we may take it for granted that we are being asked to listen to old wives' tales. As an argument for the hypothesis that the quasi-laws of the *Charanas* may not be dead yet, I would call attention to some remarks to be found in the supplementary volumes of Sir W. Jones' works<sup>1</sup> upon certain practices found to exist at Benares and other places at the end of the last century, particularly those upon the practice of *Dharnâ* as followed by

to which that work belongs, expiations were believed to be necessary to avert evil consequences of sins and crimes from any who committed them; and it was left to the sinner or criminal himself to obviate the inconvenience of such consequences. But the *Dharmasâstra* of a later and more advanced age 'directs (for the most part) that the expiation (or punishment substituted for it) should be enforced; and this is declared to be the chief duty of the king, whom we see invested with almost uncontrolled power.' It may have been the duty of the King to punish, but did he do it? In quite late times bulky works on *prâ-yaschitta* (expiation) 'have been compiled without the slightest allusion to punishment by the State;' and probably the State has rarely punished criminals in the interests of public justice.

<sup>1</sup> At ii. pp. 739 et seq.

Brahmans. When a debtor persisted in withholding payment of his debt, a Brahman was sent to his house, armed with a poignard or a dose of poison, who declared him to be under arrest, and threatened instantly to commit suicide should the arrest be broken, and sat down before the house resolved not to break his fast until payment of the debt. A Brahman so employed actually poisoned himself and died before the house of some Rajputs in January 1794, in the Benares District. Sir W. Jones says this practice is not authorised by the *Śâstra*, that is, of course, by the then existing *Dharmaśâstras*; and the question is, how did it originate? We must suppose, it would seem, that the Brahmans who thus practised *Dharnâ*, acted in accordance with the peculiar laws of their *Charana*, which laws might or might not have been committed to writing in some *Sûtra* work not known to Sir W. Jones. A trace of the existence of the custom probably may be found in Marco Polo's account<sup>1</sup> of the mode in which creditors arrested their debtors in the extreme South.

I now come to the third topic of inquiry, one of considerable importance and difficulty, as may have been suspected from a few remarks made above.

(3) *What are the precise ideas denoted and connoted by the words Charana and Śâkhâ, respectively? To what extent, if any, was it lawful for Charana A to accept and follow the doctrine of Charana B? What Charanas adhered to the old 'black Yajur-Veda,' and*

<sup>1</sup> Yule's *Marco Polo*, ii. 279. See below.

what to the new 'white Yajur-Veda,' founded by Yâjñavalkya, of the family of the Vâjasaneyins? What was the nature of the religious movement which followed upon the foundation of the new Veda, and how far was it connected with Buddhism? Was Yâjñavalkya a Buddhist teacher?

We have seen that at a very early time the Âryans for certain reasons split up their body into many *Kulas* or clans, and that *Sûtra* works were composed to justify their separate entities. A further division took place, into *Charaṇas* or schools; but the precise mode in which it came about is difficult to understand. According to Max Müller and Bühler, a number of young Âryans used to gather round a teacher (*Āchârya*), who taught them the sacred texts of his *Śâkhâ* or recension of the *Veda*. The students in due course became teachers, and naturally taught as they had learnt, and so schools were formed, which severed into an infinite number of subdivisions. These schools were styled *Charaṇas*. And they seem to have possessed each its own *Sûtras*, prose works, composed for the purpose of teaching science. Amongst other things *Dharma*, or duty,<sup>1</sup> certainly was taught in these schools from *Sûtras*: and the *Dharmasûtras* of schools named respectively *Vasîshṭha*, *Gautama*, *Kâthaka*, *Āpastamba*, *Hiraṇyakeśin*, and *Baudhâyana*, the four last of which study the 'black Yajur-Veda,' still survive. That of the Gautama school, by the way, is generally erroneously styled a *Dharma-Śâstra*.

<sup>1</sup> See above, p. 40, n.

But though other *Sûtra* works exist in abundance, unfortunately the *Dharmasûtras* of nearly all the *Charaṇas* have perished, or at all events have not yet been discovered. All this is intelligible enough, but it is not quite so easy to understand the essential difference between the *Kulas* (clans) and the *Charaṇas* (schools or religious fellowships), and by what process the latter formed themselves after the former had been definitely established. One would have supposed that when each *Kula* had gotten its own *Śākhā* or traditional recension of the Veda, and had composed its own *Sûtras* for its own information and guidance, no further splitting up would have been possible. It may be guessed that an eminent teacher of one *Kula* drew to him pupils from other *Kulas*, and partly through converse with them formed in his mind new ideas, which gradually became the doctrines of a new school. However this may have been, Vedic *Charaṇas* sprang up in great abundance, and apparently in the course of time superseded the *Kulas* in importance and operativeness ; and at all events some of the effects of the teaching in these schools have lasted to the present day.

The distinguishing mark of the *Charaṇa*, what in fact separated it from all others of its kind, was the *Śākhā* which it possessed. According to Max Müller the term *Śākhā*, which means properly 'branch,' should be understood to signify a traditional recension of the Veda, handed down in a particular family in a particular part of India. It consisted of *Śruti* (true revelation), and therefore did not include mere law-

books (*Smṛitis*). But those who followed a particular *Śākhā* 'might well, in the course of time, adopt a code of laws, which, as it was binding on their *Charaṇa* only, would naturally go by the name of their *Charaṇa*. That this actually took place may be seen from a *Vārttika* to *Pāṇ.* IV, 3, 120, where it is said that *Kāthaka* may be used not only for the sacred traditions, but also for the laws of the *Kāthas*. Thus the *Prātiśākhya*s also were called by the names of the *Charaṇas* because they were the exclusive property of the readers of certain *Śākhās*, and even more so than the *Kuladharmas* or family laws.'<sup>1</sup> It seems that by 'the recension of the Veda' is to be understood not the recension of all the Vedas but of one particular Veda, and thus we find constant allusions and references made to the old 'black *Yajur-Veda*' and the new 'white (or bright) *Yajur-Veda*,' of both of which I have already made mention. The former of these recensions was handed down by a succession of teachers to *Tittiri* and others who gave their names to *Charaṇas*; and it was a subdivision of the *Maitrāyaṇīya*, one of these *B. Y. Charaṇas* (schools or sacred fellowships), namely, the *Mānavas*, who owned and therefore gave a name to certain *Sūtra* works, upon one of which must have been based the *Mānavadharmaśāstra*, erroneously styled the '*Institutes*' or '*Code of Menu*.' The latter recension belonged to the *Yājñavalkya Charaṇa*, whose law-book is known as the '*Institutes*' or '*Code of Yajnavalkya*.'

To what extent the followers of one *Śākhā* were

<sup>1</sup> *Ancient Sans. Lit.*, 126.

at liberty to adopt the rules of another *Śākhā* is a question. The authors of the *Sūtras* which deal with the public sacrifices appear to have aimed at establishing a certain uniformity of procedure amongst all the families ; but the *Sūtras* which deal with the family ceremonies exhibit great diversities, which would seem to have been jealously maintained. Thus in the commentary on Pāraskara's *Gṛihya-Sūtras*, it is said : 'Vāśiṣṭha declares that it is wrong to follow the rules of another *Śākhā* . . . whosoever leaves the law of his *Śākhā*, and adopts that of another, he sinks into blind darkness, having degraded a sacred Rishi.' And other authorities for this proposition may be cited. Finally Max Müller says :<sup>1</sup> 'Only in case no special rule is laid down for certain observances in some *Grihyas*, it is lawful to adopt those of other families.' Perhaps, therefore, the general rule may have been something like this :<sup>2</sup> If *Śākhā* A contains a rule applicable to a particular fact, and *Śākhā* B contains a different rule applicable to that fact, a follower of A may not guide himself by the rule in B ; but if B does, and A does not, contain a rule applicable to the fact, a follower of A may guide himself by the rule in B. Should this hypothesis be correct, the general rule will be found to have been in exact agreement with the rule laid down by Gautama with respect to a conflict between autho-

<sup>1</sup> *Ancient Sans. Lit.*, 51.

<sup>2</sup> I am aware that the object of the *Mīmāṃsā* system of interpretation of scriptures was to explain away and reconcile all differences, and bring everything into harmony ; but the question remains, how far do ordinary Brahmans of the present day approve and follow that system ?

rities on law, as explained above, namely, that where such conflict occurs, a man may elect to follow either authority ; but he must do so once for all, and consistently adhere to his choice ; he may not follow one authority to-day and another authority to-morrow.<sup>1</sup> The practical importance of this question, of the right of Brahmans and others to follow *Śākhās* other than their own, would be at once understood if a defendant in a suit were to object to the claim, on the ground that the law relied on by the plaintiff was opposed to the law laid down in the parties' *Śākhā* of their Veda. Such answer, I believe, has never yet been made in a court of justice ; but before long it may become quite common. In the meantime it may be commended to the notice of any pleader who may have to appear for the defence in a big case between two Brahmans, particularly if they belong to the 'black *Yajur-Veda*.' The plaintiff will be pretty sure to rely on the *Mitākārā*, and if the Judge can only be brought to see that the 'paramount authority' belongs to the 'white *Yajur-Veda*,' victory should not be very hard to obtain.

Of the six *Sūtras* on law that have come down to us, or (to speak more accurately) that are known to survive, no less than four, as we have already seen, belong to the 'old' or 'black *Yajur-Veda*,' namely, the *Āpastamba*, *Hiranyakeśin*, *Baudhāyana*, and *Kāthāka Dharma-Sūtras*. That of Gautama is thought

<sup>1</sup> What can be the origin of the Anglo-Indian doctrine of '*factum valet*'? The phrase can hardly be Sanskrit. It savours strongly of the Canon Law, and probably was bred of some misconception as to some Brahmanic concept. See below.



by Bühler certainly to belong to the *Sâma-Veda*, whilst there is some evidence to show that originally it was studied by the Chândogas alone. To what Veda the *Vâsishtha* school belonged, I have not been able to ascertain. Of the four *Sûtras* above-mentioned, the oldest according to Bühler is the Baudhâyana, whose author founded the *Charana* which bears his name. After him came Âpastamba, who likewise founded a school. And last comes Hiranyakeśin, whose successors reach to the present day. With regard to the Âpastambîya school there exists some creditable information of an important character; and it seems to be not improbable that the *Charana* arose in South India, in the part vaguely described as the Ândhra country, in a comparatively late era; that is to say, not many centuries before the birth of Christ. And further the *Mahârnavâ* states that this school prevails in the countries south of the Nerbudda, particularly in the Madras Province, excluding the Northern Sirkars and the Western Coast. And Bühler, judging from what he has seen and heard, believes this very interesting statement to be fairly correct.<sup>1</sup> Assume for a moment that it is so, and the question at once arises, how can it have come about that the *Mitâkharâ*, which belongs to the 'white *Yajur-Veda*,' is the 'paramount autho-

<sup>1</sup> V. N. Mandlik, in the Introduction to his *Hindû Law*, pp. vii. and viii., gives an extract from a commentary on the *Charanavyûha*, which contains the passage alluded to. And at p. xi. he observes: 'Except some among the Desastha Brahmans along the Godâvari, and a small number of Drâviḍas from Tinnevely and other parts of Madras settled at and near Satara, there are no Âpastambîyas in the Bombay Presidency.'

rity' for the Brahmans of the Madras Province? Is not the alleged fact impossible? In connection with this subject it is to be observed that Âpastamba appears to be scarcely noticed in the *Mitâxarâ*; whilst, if I am not mistaken, Baudhâyana and Hira-nyakeśin are not noticed at all in that treatise.

It appears that the name Âpastamba is sometimes given to the 'black *Yajur-Veda*,' which commonly goes by the name of the *Taittirîya-Veda*, and from this circumstance we can only infer, with Bühler, that that particular recension was followed by the Âpastamba school. Perhaps, however, we may go further and infer that this school was at one time, if it be not now, as numerous and important as was ever the Taittirîya school from which it sprang. Be this as it may, we should expect to find a close resemblance between the laws of the Âpastambas and the laws of the Mânavaś, since both these schools must have founded their rules of conduct on one and the same recension of the Veda; but unfortunately the Mânava law-*Sûtra* has perished, and we have only the modern and relatively unimportant redaction into verse, the '*Code of Menu*,' available for the purposes of comparison. The *Hiranyakeśi Dharmaśâstra* is stated by Bühler to be in close agreement with that of Âpastamba.

I have not been able to get any information of value touching the *Charaṇas* that adhered in early times to the 'white *Yajur-Veda*.'<sup>1</sup> It has not been

<sup>1</sup> According to V. N. Mandlik (*Hindû Law*, Introd. lix.), the study of this Veda has considerably declined, though its nominal adherents are a large class.

doubted, I believe, that the Yâjñavalkya school which gave its name to the '*Code of Yâjñavalkya*,' followed that recension, but as to other connected schools we are in the dark. That the Yâjñavalkya school arose in Mithilâ seems to be rendered sufficiently probable by the Introduction to the *Yâjñavalkya Code*, which declares that the Code was propounded in that city, where the 'Prince of the *Yogîs*' was then living. It remains to be seen whether the school always was confined to the place of its birth, or in the course of time pushed its branches into many other parts of India. There are indications that the Mithilâ folk have at all times been different from other Indian peoples, and the *Gentoo Code* shows plainly that they were regarded by its compilers as peculiar in their views. It is difficult, therefore, to understand how the *Maithila Śākhā* could at any time have found adherents in the Madras Province ; whilst at present it would seem to be simply impossible to believe that the school which followed it could ultimately have succeeded in inducing all the 'black *Yajur-Veda*' families of the South to adopt its *Dharmaśāstra* as explained by Vijñāneśvara.<sup>1</sup> It was Colebrooke who first announced, in 1810, that the *Yâjñavalkya Code*, so explained, was the authority for all the '*schools*' except that of Bengal ; and it is amusing to compare the words in which he makes this rash announcement, in introducing to the public

<sup>1</sup> Ellis, in his paper at II. Strange, 164, says of 'the practice of the various tribes of *Dravida*,' that 'it would be difficult to enumerate all the practices not merely unsupported by, but as here assumed, in direct contradiction to, the law of the *Smṛitis*.'

his translation of the *Mitâxarâ*, with the very qualified terms previously used by him in his *Introduction to the Digest*. On the earlier occasion he had merely said that the author of the *Mitâxarâ* had composed 'a treatise which may supply the place of a regular Digest: it is so used in the province of Benares, where it is preferred to other law tracts; but some of his opinions have been successfully controverted by late writers.' It would be interesting to learn what occurred to make Colebrooke change his mind in so great a degree between the dates of these two *Introductions*, and particularly what new sources of information were opened out to him before he discovered that a certain law-tract was universally respected in twenty distant countries which he had never visited, and with the languages of which he was wholly unacquainted. It was sufficiently venturesome in him to pretend to know exactly what was the state of things in the ill-organised, make-shift courts of the country round Benares; and I imagine that very unpleasant questions might have been asked of him as to who used the *Mitâxarâ* as a Digest in the Benares Province, and by whose order, and for what purposes, and particularly as to whether the whole of the commentary was so used, or only parts of it, *e.g.*, the 'Chapter on Inheritance.' It is quite possible that, as I heard some years ago was the case in a Brahman-haunted portion of the Madras Province, the *Mitâxarâ* was habitually consulted in Benares as an authority not on law but on certain minor ceremonies. But if it was venturesome in Colebrooke to

state as facts what he had picked up from gossiping natives as to authorities on law in vogue in his own part of India, what should not be said of his temerity in gravely publishing to the world in 1810 that the *Mitâxarâ* 'is received in all the schools of *Hindoo* law, from Benares to the southern extremity of the peninsula of *India*, as the chief groundwork of the doctrines which they follow, and as an authority from which they rarely dissent'? No man, however learned, should have risked his reputation by making such a statement, which at the best could only turn out to be a lucky guess ;<sup>1</sup> and which, I verily believe, will be found hereafter to be absolutely untrue, and to have been based upon no real authority whatever. I purpose to discuss this matter by and by at some length ; in the meantime I will merely observe that the celebrated Abbé Dubois, a contemporary of Colebrooke, who for some twenty years or more lived in daily converse with the Brahmans of Mysore, appears never to have heard of the *Mitâxarâ* ; and in describing the laws of the Hindûs, states that he has been guided by the '*Directory or Ritual of the Purohitas* ;' and gives specimens of laws quite different from those of the *Mitâxarâ* ; and winds up by declaring that in India 'there is no public system of law ; and custom, as various as the tribes, regulates everything.' The

<sup>1</sup> In a letter dated March 14, 1812 (quoted at II. Strange, 132), Colebrooke, after referring to Manu, Jagannâtha, and the *Mitâxarâ*, goes on to observe: 'In books which I understand to be of most authority at Madras (for instance, the *Smṛiti Chandrikâ*), the prohibitions, &c.' Apparently, therefore, in 1812 he did not suppose that he knew much about the 'Madras school.'

venerable Dubois is entitled to a great amount of credit when he merely tells us what he himself has observed. But his testimony on these points is corroborated by ample evidence.

It is possible that some unexplored portion of the enormous existing Sanskrit literature may yet throw light upon the now obscure question, what was the nature of the religious movement that led to the schism of the Vājasaneyins from the Charakas, the ancient school of the Adhvaryus, and the proclamation by the sage Yājñavalkya of the new *Yajur-Veda*, to be known as the 'white' or 'bright.' But at present we do not even know where the schism took place: and its approximate date has hardly been guessed at. Only two solitary facts bearing upon it seem to have been ascertained, and one of those appears to be of a somewhat questionable character. I allude to the Śaiva sect regarding as their own principal book the 16th Book of the *Sanhita* of the Vājasaneyins, and to Yājñavalkya (the sage, not the versifier) being described in the *Mahā Bhārata* as a Buddhist teacher.

I have already said, in Chapter II., all that needs to be said about these two things. But in connection with them may be suggested here the necessity of Orientalists making at an early date a thorough exploration of the great mass of Śaiva literature known as the *Āgamas*. Those comprehensive works are believed to deal with religion, ethics, and philosophy, and with science as known to the ancients, in all their numerous branches; and it would be strange indeed

if they were silent about the matter of the *Dharmaśāstras*, or even if they did not contain some novelties in law, of which the very existence has hitherto been unsuspected. It is said,<sup>1</sup> for example, that the *Lingayets*, whose sect was founded by Vrishabha (or Basava) utterly reject the Vedas and the authority of Vyâsa, and practically deny the purity of any caste but their own. They bury their dead, and perform no obsequies after doing so. And, as was declared as touching the Jains in a decision of the Bombay High Court (10 Rep., 241), the Lingayets 'regard the birth of a son as having no effect on the future state of his progenitor, and, consequently, adoption is a merely temporal arrangement and has no spiritual object.'<sup>2</sup> In short, the *Lingayets* more nearly resemble *Jains* than *Hindûs*, and it would be only just and reasonable to administer their own laws<sup>3</sup> to them. Certainly it is not just and reasonable to attempt to oblige them by laws derived from the Vedas and other authorities which they openly reject and even deride.

<sup>1</sup> In the *Indian Jurist* for June 1879, in a letter written by a very intelligent Brahman.

<sup>2</sup> Almost the same words were used in a Jain case (6 N. W. P., 392), cited by Mayne in § 116. And see below.

<sup>3</sup> In Steele's *Hindoo Castes* it is stated that, upon inquiries being made at Poona, the '*Lingayet*' (or '*Jangama*') gave in a list of seventeen Sanskrit works 'held of authority' in his caste. Even the Tamil Pariahs have their own priests, called *Valluvans*, who refer to books of their own (Buchanan's Journey, I.). And the *Mâdigas* (Chucklers) of Mysore have their religious class called *Jambus*, and a *Maṭam* at Cuddapah (Ib. 251-2). The *Curubas* have a book peculiar to their caste (Ib. ii. 26). The *Panchâla* have their own *Gurus*, who read the *Vishwa Purâna* (Ib. ii. 289).

## CHAPTER IV.

*The Mānavas a subdivision of the Maitrāyanīyas—Are extinct—The case of 'Menu's Code'—Medhātithi—Varadarāṣiyam alone based on Manu—Manu and Nārada—Viṇāśeśvara's biography by Colebrooke—Nothing really known about the author of the Mītākṣarā—Was Dhāreśvara Dara-Shukoh?—The Mādhaviyam—Difference between it and the Mītākṣarā—Which should be preferred?—Ellis's ultimate choice—The Smṛiti-Chandrikā—The Sarasvatīvilāsa—The Varadarāṣiyam—Authority of the Mītākṣarā—Importance of determining it—No Madras School of Law—The proper use of the modern treatises—The task.*

OUR next question is—(4) *Who were the Mānavas, whose Dharmaśāstra is known as the 'Code of Menu'? Where did they live? When did they become extinct? What sect, if any, now represents them? Were they very numerous, or powerful, or notable; or was there anything special about them that induced other sects to govern themselves by their teaching? And, in particular, did their influence reach down to the south of India?*

We learn from Max Müller and Bühler that the Mānavas, as appears from the *Charaṇavyūha*, formed one of the six subdivisions of the Maitrāyanīyas; who studied a redaction of the old 'black *Yajur-Veda*.' They derived their name from a Manu, a mortal, not the 'self-existent,' and their school was known as the *Mānavacharāṇa*. Professing Mānavas are not now to be found anywhere; but some Maitrāyanīyas may



still be met with in Western India,<sup>1</sup> who use as their own treatises certain *Sûtras* called *Mânava*, and whose *Sanhita* has been discovered. Unfortunately they have lost, if they ever possessed, their *Dharmasûtra* : and therefore it is not possible decisively to settle the question, whether the *Mânava Dharmaśâstra* was founded on a *Mânava Dharmaśûtra*. But Max Müller does not doubt that such was the case.

Since the Mânavas have become extinct, whilst Âpastamba folk, who represent another 'black *Yajur-Veda*' school, are very numerous in South India at the present moment, it is only natural, in the total absence of evidence to the contrary, to suppose that the Mânavas never were very numerous or very influential in any part of India. And if they were not so, the question arises, how did it come about that the law-book of an obscure, petty, extinct sect was believed and declared by Sir William Jones to contain the law of the Hindûs generally? Inquirers may settle this curious question hereafter. In the meantime we may be content to suppose that the father of Sanskrit study and his advisers confounded Manu, the founder of the Mânava school, with another Manu, who, according to tradition, had proclaimed laws to men; and further confounded our modern and improved edition of the Mânavas' law with the original versified redaction founded on the *Mânava Dharmaśûtra*. Max Müller's very interesting 'statement of the case' of the 'Code of Menu,'<sup>2</sup> shows how excusably

<sup>1</sup> Bhâu Dâji says M. Brahmins are still to be found round Dowlatabad. Bomb. R. A. S. Journal, No. xxv., Art. 7.

<sup>2</sup> Given in Bühler's *Hindoo Law*, 2nd edit., p. 16 n.

easy it has been to make mistakes about the work. First of all tradition speaks of no less than three redactions prior to ours ; and of an ' old Manu ' as well as of a ' great Manu,' both distinct from Manu. Then, whilst Vāsisht̥ha is quoted at Manu viii. 140, that writer himself quotes, as of Manu, four verses, of which two are, two are not, found in '*Menu's Code*.' Next, it appears that Baudhāyana cites Manu as an authority for doing a thing that on the contrary is expressly forbidden by Manu, ix. 89. And, lastly, both the *Mahābhārata* and Varāhamihira, the astronomer of the tenth century A.D., cite as from Manu verses which are, and also verses which are not, found in our Manu. Apparently, therefore, the name of Manu must have been given, mediately or immediately, to many different law-books published at different times ; and our '*Code of Menu*,' if not the very latest of those works, at all events was published at a later date than in the time of Varāhamihira of the tenth century A.D. Admittedly the first writer who vouches for it is Mēdhātithi, who is supposed to have lived about the tenth century of our era. And he does not vouch for the whole of the text, as has been shown in the note to p. 37, above. For some reason or other a Manu who published laws seems to be regarded as the principal of the 'black *Yajur-Veda*' authors of laws, as a Yājñavalkya is regarded as the principal of the 'white *Yajur-Veda*' authors of laws. And yet, curiously enough, whilst Āpastamba people predominate (so I am informed) all over south India, Varadarāja's treatise alone, of all the treatises alleged to

be current in Southern India, is based on the texts of Manu, and not on those of Yājñavalkya. Ellis indeed, as Burnell says, stated that this treatise is based on Nârada ; but he was led into error, probably by the connection which appears to exist between Manu and Nârada,<sup>1</sup> and which requires investigation. It remains to be seen whether Manu should not be considered to be an authority for South India superior to Yājñavalkya, and whether Âpastamba should not be considered to be greatly superior to either.

(5) *What was the origin of the now celebrated Mitâkarâ of Vijñânesvara? Where, when, and with what object, or for whose benefit, was it compiled? Is the existing the original text, or a quite modern recension? Who was the author? What are the grounds for the belief that this work was and is the 'paramount authority' on inheritance and succession over a considerable part of India? Does it contain any positive laws or commands, or any collection of actual usages and customs, or is it a mere exposition of speculative opinions of a religious recluse, upon subjects with which he could not possibly be conversant? Was the work at any time considered authoritative, in so far as it professes to deal with law, in the countries of South India? And what is the truth about other so-called works of authority in the Madras Province?*

‘Vijnanesvara, often called Vijnyana-Yogi, is known to have been an ascetic, and belonged, as is affirmed, to an order of Sannyasis, said to have been

<sup>1</sup> *Varadarâjyam*, Introduction, xvi.

founded by Sankara-Acharya. No further particulars concerning him have been preserved.' Such is the history of the author of the 'paramount authority,' the 'famous commentary,' as told by Colebrooke in his introduction to his two *Treatises on Inheritance*. It would be difficult to give fewer particulars of the life of a man, and almost impossible to say what little is said in a more hesitating and unsatisfactory way. The very first statement, that the commentator 'is known to have been an ascetic,' strikes me as being exceedingly suspicious, if not actually erroneous, for in Colebrooke's day who could possibly know the fact? The word '*Yogî*' generally is used to denote a religious ascetic, and of course it may be very probable that one who was called *Vijñāna-Yogî* in fact was an ascetic; but more than this it is impossible with confidence to say. As regards the next statement, that the *Yogî* belonged, 'as is affirmed,' to an order of *Sannyâsis*, the observation occurs that if it be doubtful whether the commentator was an ascetic, it must be much more doubtful whether he belonged to a particular religious order. One would fain know who 'affirmed' this fact, and what special means of knowledge the affirmants possessed. And then we come to the third statement, that the above order was 'said to have been founded by Śankara-Āchārya.' The doubt upon this head must be indeed prodigious, and yet a few lines lower down Colebrooke gravely speaks of this 'saying' as of a 'received opinion'! I must notice this slight biographical memoir at some little length, at the risk of being tedious, because I think it

of the highest importance, if an attempt is to be made hereafter to study Hindû law methodically and scientifically, that the unauthorized and scientifically valueless dicta of great men should be ruthlessly set aside and rendered harmless. This whole statement about Vijñāneśvara having belonged to an order founded by the great reformer Śankara-Āchārya, a statement for which apparently there is not a scintilla of admissible evidence,<sup>1</sup> was used by Colebrooke himself as an argument from which to educe the probable date of the commentator ; and now, after the lapse of more than two generations, in the year 1878, we find Bühler<sup>2</sup> using this same argument for the same purpose ! He states : ‘ We thus obtain the following series : 1, Śankara, eighth century ; 2, Medhātithi ; 3, Vijñāneśvara ; 4, Madanapāla, fourteenth century.’ I do not doubt that the great commentator is later than Medhātithi, but must object most strongly to the groundless assumption that Vijñāneśvara lived before Madanapāla, who is supposed to have reigned in 1375,

<sup>1</sup> The little evidence there is seems to point the other way. In Article iv., No. xxv., Vol. ix., Journal Bombay R. A. S., Bühler declared himself ‘ enabled to correct Mr. Colebrooke’s opinion that Vijñāneśvara was a follower of Śankarāchārya, since the latter devoted himself to the exclusive worship of Śiva, whereas the former appears to have been a devotee of Kṛishṇa or Viṣṇu.

<sup>2</sup> See the introduction to his *Digest*, 2nd edition, which would seem to ignore the opinions recorded ten years before in the paper referred to in the note above. According to that paper Vijñāneśvara ‘ may be safely placed in the latter half of the eleventh century after Christ.’ But, seeing that the argument used is wholly derived from the contents of some verses that Bühler found added at the end of an old MS. of the *Mādharā*, dated Śaka 1389 (= 1467), but which he believed ‘ did not belong to Vijñāneśvara himself, but have been added by some *Śāstri* or copyist,’ I should be inclined to think the argument worth very little indeed.

because, forsooth, a certain poem, the Madanavinoda, to which that king is 'supposed' to have given the title, bears that date. The fact is, the approximate date of Vijñāneśvara has not yet been fixed, and much remains to be done before a cautious inquirer will venture to attack the problem of the age, place of residence, and history of that author. No one has thrown any real light upon the subject since Colebrooke dealt with it, and his conclusion was that : 'It may be inferred as probable that the antiquity of the *Mitâxarâ* exceeds 500 and is short of 1,000 years.' But he goes on to say : 'If indeed Dhâreśvara, who is frequently cited in the *Mitâxarâ* as an author, be the same with the celebrated Raja Bhoja, whose title may not improbably have been given to a work composed by his command, according to a practice which is by no means uncommon, the remoter limit will be reduced by more than a century ; and the range of uncertainty as to the age of the *Mitâxarâ* will be contracted within narrower bounds.'

I see no reason to except to this last argument, and would wish to apply it to a suggestion of my own which I believe to be quite original, namely, that the Dhâreśvara above-mentioned may be none other than the celebrated Prince Dârâ (commonly known as Dârâ-Shukoh),<sup>1</sup> who was put to death by his brother Aurangzib in 1659, as being an infidel, and dangerous to the established religion of the empire. That

<sup>1</sup> It may be objected that the spelling of the Sanskrit name does not agree with that of the Mahomedan ; but the difference is not greater than sometimes is observable in a Sanskrit name as given by different Sanskrit writers, e.g., *Āpastamba*, which appears also as *Āpastambha*.

enlightened Prince not only closely studied the principles of the Hindû religion and philosophy,<sup>1</sup> he translated fifty of the *Upanishads* from Sanskrit into Persian, with the assistance of several *Pandits* of Benares ; and it was this translation of his that was discovered by Anquetil Duperron, and first excited the attention of Europeans to the (supposed) treasures of Hindû thought. In the *Asiatic Researches* may be found a Brahman's account of his religion in which this Dârâ's name is cited as an authority, and it would seem to be quite possible that, amongst other subjects, Dârâ may have written or translated something on *Āchâra*, and so got his name cited in the *Mitâkharâ*. Of course I do not wish to be understood to consider this as certain or even probable ; but the suggestion would appear to be not altogether unworthy of notice, and to be at all events less improbable in itself than the suggestion that Dhâreśvara is the same with the mythic Bhoja, Lord of Dhâr, about whom nothing certain is known, and the fact of whose existence may be said to be doubtful.<sup>2</sup> Should my suggestion turn out to be correct, the date of the *Mitâkharâ*, as we have it, must be referred to the seventeenth or eighteenth century, not to the middle ages. I say 'as we have it,' because, unquestionably,

<sup>1</sup> Weber, amongst others, says he was a great patron of Hindû literature (*Hist. Ind Lit.*, p. 383). And see Bernier (Brock's Transl.), i. 6.

<sup>2</sup> From Bhâu Dâji's remarks at p. lxxv., App. to No. xxv., Vol. ix., Bombay *R. A. S. Journal*, it appears that 'when Bhoja's works are quoted, the expression "iti Bhojah" always occurs, and there is a possibility of Dhâreśvara being an independent and Southern author. Nilakantha has a Dhâreśvarâchârya.'

it is possible that the existing text of the *Mitâxarâ* may be a recension of an earlier work, and may contain interpolations.

It has already been pointed out that the *Vyavahâra* or jurisprudence portion of the *Mâdhavîya* commentary is said by Burnell to be 'little more than an abridgment of the *Mitâxarâ*,' composed by the author of the *Mâdhavîya* in order to supply a blank in his text. It has occurred to me, however, that perhaps it would be difficult to refute the opposite hypothesis, that the *Mitâxarâ* is an enlarged and revised edition of the treatise attributed to Mâdhava. It is true that that treatise professes once<sup>1</sup> to cite *Vijñânesvarayogin* as an authority, but that is not the same thing as citing the *Mitâxarâ*. Granted for a moment that the *Mâdhavîya* treatise is the basis of the *Mitâxarâ*, and the fact that the latter work has been the subject of no less than four commentaries in modern times, and has been studied and followed in a greater or less degree by many modern writers on law, becomes readily intelligible. For Mâdhava, so Burnell tells us,<sup>2</sup> 'was the prime minister of two or three of the kings of Vijayanagara in the Deccan, during the last half of the fourteenth century,' and 'the wonderful literary activity of that era must be attributed entirely to the exertions of his family,' whilst he himself 'had at heart the renovation and restoration of Hindooism.' Such a man naturally would have many followers and imi-

<sup>1</sup> Namely, in § 25. But in that passage, I observe, the opinion ascribed to V. is the exact opposite of the opinion really given in the *Mitâxarâ*, i. 7, 11.

<sup>2</sup> Introduction to the *Dâya-Vibhâga*, x.



tators, and one of these may have brought out the *Mitâxarâ*, whilst the Narasinga dynasty still flourished in the Telugu country during the sixteenth or seventeenth century. As has been shown above, Anquetil Duperron was told that Vijñāneśvara was the name of a Telugu king who had collected the laws, *Vijñāna*, and possibly his information may have been correct upon this point. Possibly the king meant was the famous Krishṇa, who at the beginning of the sixteenth century 'restored nearly all the temples of the south of India to the state in which they remain.'<sup>1</sup> In connection with this whole hypothesis it should be observed that according to Burnell<sup>2</sup> Mādhava 'was a Smārta Brahman, and appears in the latter part of his life to have become a Sannyâsin or recluse.' Now all *Smārta* Brahmins, I believe, are followers of Śankara-Āchārya, and thus a striking resemblance presents itself between the tradition given by Colebrooke touching the author of the *Mitâxarâ* and the tradition given by Burnell touching the alleged author of the *Mādhavîya* treatise.

An important difference between these two works is noticeable in the authorities cited by them respectively. Thus, whereas the *Mitâxarâ*, following the text, omits all mention of Baudhâyana, except that the work attributed to him exists, the *Mādhavîya* treatise quotes that work on several occasions. And so with Āpastamba. Also it quotes the 'black *Yajur-Veda*,' the *Aitareya-Brâhmaṇa*, *Pâraskara*, and many other works not referred to by the *Mitâxarâ*; whilst

<sup>1</sup> Burnell, *Loc. Cit.*, xi.; note.

<sup>2</sup> *Loc. Cit.*, x.

the latter, on the other hand, quotes one or two works not quoted in the former. A careful comparison of the authorities cited by the two works respectively may enable the inquirer to ascertain, at all events with some degree of probability, which of the two should be considered the earlier work.

It is a noteworthy circumstance that whilst Colebrooke appears to have known nothing about the *Mādhavīya* treatise, and spoke only of the *Smṛitichandrikā* as 'having considerable weight' in the South 'concurrently with the *Mitāṅgarā*,' Ellis<sup>1</sup> has expressly declared that the difficulty of choice as between competing authorities lay between the *Mādhavīyam* and the *Mitāṅgarā*, the latter of which 'is generally supposed to have been composed in Northern India, but it is sometimes claimed as a production of the South.' Ellis finally declared in favour of the *Mitāṅgarā*;<sup>2</sup> but his statement of reasons for doing so certainly is not satisfactory, and I cannot help thinking that he suffered his judgment to be borne down and overridden by the absurdly great authority conceded to Colebrooke, who knew absolutely nothing about Madras. Ellis consulted, and apparently respected the opinion of, a native adviser, one Patābhi Rāma Śāstri; and what that adviser told him should have made him deaf to the utterances of the Bengal oracle. The Śāstri, being unwilling no doubt to differ from Colebrooke, and seeing the

<sup>1</sup> See the *Madras Lit. Soc. Trans.*, 1827.

<sup>2</sup> In 1812 (see II. Strange, 164) Ellis had stated plainly that the *Vidyāranya Svāmī* (Mādhava) was the principal authority in South India, having been 'the lawgiver of the last Southern Hindā dynasty.'

bias in Ellis' mind, 'admitted that the *Mitâxarâ* of Vijñāneśvara was the most prevailing authority,' i.e., with respect to India generally, of which the Śâstri knew nothing or very little; 'but said that in the *Ândhra* country, the *Smṛitichandrikâ* and *Sarasvatî-Vilâsa* were chiefly esteemed; in the *Drâvida* the *Sarasvatî-Vilâsa* and *Varadarâjîyam*; and in the Carnatic the *Mâdhavîyam* and *Sarasvatî-Vilâsa*.' That is to say, the Śâstri politely declined to admit that the *Mitâxarâ* was the paramount authority in any country with the condition of which he professed to be at all well acquainted, and actually named the authorities which, to the best of his knowledge and belief, in fact were current in those countries. To my mind nothing can be clearer than this; and I find it difficult to understand how a man of Ellis' acumen and knowledge failed to perceive what seems to be so very obvious. 'Dust, surely, must have been thrown in his eyes.

It may be doubtful how far the Śâstri was right in supposing that the above-mentioned works were chiefly esteemed in the countries ambiguously named by him; but at all events his opinion that the *Mâdhavîya* treatise was the proper authority for the Vijayanagara country (which doubtless he meant by the Carnatic), consists with the belief that that treatise is rightly ascribed to the great minister of Vijayanagara, and deserves far more weight than Colebrooke's wild assertions about the *Mitâxarâ*. If these assertions had never been made, and if Burnell had translated the *Mâdhavîya* treatise in 1800 instead of in

1868, there can be but little doubt that Ellis would have pronounced that treatise to be the only authority good for Madras, and we should never have heard of the *Mitâxarâ* as being obligatory on any person living south of the Nerbudda.<sup>1</sup>

Of the three works other than Mâdhava's declared by Ellis' Śâstri to be authoritative for South India, Ellis appears to have doubted the authority of two, and to have questioned the utility of the third, namely, the *Sarasvativilâsa*. The *Smṛitichandrikâ* he thought valuable, as showing the constitution of the several sorts of judicial tribunals in South India. But he was advised that it belonged to Vijayanagar, and apparently was not 'under Government sanction.' The *Sarasvativilâsa*, in his opinion, was the standard work of Orugallu, and proclaimed the absolute nature of the Prince's power, his claim to be lord of all the soil, and other kindred matters. Burnell's preface to his Varadarâja's treatise tells us that it probably was composed by a native of the Tamil country, at the end of the sixteenth or beginning of the seventeenth century, and 'its chief merit is that it is brief and comparatively free from pedantic discussions.' It is full of errors, and seems to be only a hash of matter from the *Mitâxarâ*, *Smṛitichandrikâ*, and other works. Of the *Sarasvativilâsa*, Burnell says, in the same

<sup>1</sup> As regards Bombay, V. N. Mandlik says (*Hindû Law*, Introd., lxxi.) that the *Mitâxarâ*, 'as a matter of fact, is less consulted than the works of Hemâdri, Mâdhava, and the *Bhaṭṭas*.' These last, he observes, are of the people, and write for the people; whilst the M. is only one of many commentaries, and one 'limited in its scope, and of a speculative character' (*Ib.* lxix.).

place, that he has been able to find only two copies of the work as yet, and that it is interesting rather from a historical than from a practical point of view. It will be valuable in tracing the differences of opinion which are found in the law-books, as it contrasts the teaching of authors whose names only are now known, but it is, for this reason, impossible to consult it by mere extracts. Of Devāṇḍa Bhaṭṭa's *Smṛtichandrikā*, an edition and translation of which was prepared by Goldstücker,<sup>1</sup> Burnell tells us but little, except that it is 'remarkable for good common sense, and is eminently adapted for use by practical men.'<sup>2</sup> On the whole, therefore, it remains doubtful whether at the present moment there is any sufficient reason for supposing that there are authoritative works on law for South India,<sup>3</sup> especially when we find Goldstücker repeatedly and deliberately announcing in his paper on the administration of the Hindû law that the *Mitâṣarâ* has been superseded, and the *Smṛtichandrikâ*<sup>4</sup> and Mâdhava's treatise 'have become the first legal authorities, on matters of inheritance, at Madras.' By the way, what would the natives say to this, I wonder? With what feelings would a devout Brahman receive the intelligence that the 'paramount

<sup>1</sup> I am informed that unfortunately it has not been found amongst his papers. A translation of the *Dâyabhāga* portion was published at Madras in 1869.

<sup>2</sup> Introduction to *Mâdhaviya Com.*

<sup>3</sup> See notes, p. 44, above.

<sup>4</sup> I observe that Mandlik says at the very end of his book: 'I am fortified in my conclusion that the printed *Dattakachandrikâ* is not the work of Devaṇṇa (*sic*) Bhaṭṭa.' Do we know anything about the *Smṛiti-Ch.*?

authority,' in other words a most sacred book, had been put aside by the Government as inferior to two modern treatises that seemed to English lawyers to be somewhat more sensibly put together ?

It seems proper to remark here that Colebrooke and the others who have declared the *Mitâxarâ* to be the leading authority on succession, &c., may have been misled by information properly given but not properly understood. It is quite possible that their native informants, who told them that the *Mitâxarâ* was respected all over India, were thinking when they spoke of the third part of the work, which deals with *Prâyaścitta*, penance, purification, and kindred subjects, and not at all of the second or *Vyavahâra* part which contains twenty-three chapters, including that on *Dâyavibhâga*, or inheritance. From inquiries I have made I believe there is ground for supposing that Brahman Pandits resident in South India in fact do consult the *Mitâxarâ* upon certain special matters dealt with in its third part, but would never dream of going to it for law in our sense of the term, for the simple reason that that is a secular subject with which they have not any the slightest concern.<sup>1</sup>

But, even if Brahmins from time to time do consult the *Mitâxarâ* for certain purposes,<sup>2</sup> it by no means follows that they regard the work as orthodox

<sup>1</sup> There is reason, however, to suppose that the works of Hemâdri on law and custom are in great repute amongst the people, though not cited in the courts as authorities on law. See Bombay *R. A. S. Journal*, No. xxv., App. lxxvii.

<sup>2</sup> Brahmins care only for *dharma*, which (from their point of view) is practical and remunerative to the individual; whilst *vyavahâra*, or civil law, is a matter for the State, and brings profit to no man.

and worthy of veneration. Recently I was informed by a learned Hindû that when the Brahmans of South India worship their books at a certain yearly festival, they are careful to exclude from their list of objects of worship the works ascribed to Gautama, though they habitually regard that name as the name of a great sage and teacher, and read *Gautama* works. They will not venerate the name, though they are willing to recognise and profit by the intellectual power of the person supposed to have borne it. It is possible that the *Mitâkarâ* may be used and regarded in much the same way. I have already drawn attention to the fact that this work would appear to belong to the 'white *Yajur-Veda*,' which was a schismatic *Śâkhâ*, and therefore may reasonably be suspected of having a Buddhistic origin.<sup>1</sup> And I am informed that adherents of the 'white *Yajur-Veda*' form at the present day the smallest division of the Brahmans of South India ;<sup>2</sup> whilst the next smallest division of them comprises the *Sâma-Vedîs* or adherents of the *Sâma-Veda*, upon which the *Gautama Dharmaśâstra* is declared by Bühler to be founded.<sup>3</sup>

The majority of South Indian Brahmans, I am told, are professors of the *Āpastamba Śâkhâ* or old 'black *Yajur-Veda*,' though *Ruk-Vedîs* are sufficiently numerous all over the South.

An orientalist conversant with the ways of the country, and working on the spot, probably might

<sup>1</sup> See note 1, p. 74, above, as to Vijñāneśvara being a worshipper of Krishna or Vishnu.

<sup>2</sup> Not so elsewhere. See note 1, p. 63, above.

<sup>3</sup> See p. 62, above.

ascertain in the course of a few months the exact extent of the authority of the *Mitâxarâ* as a treatise on law and otherwise amongst the Brahmans of the Madras Province. And I should be indeed glad to learn that Burnell had begun to investigate the matter. Certainly, it is anything but creditable to Madras jurisprudence that whilst the Madras High Court, following Colebrooke, invariably acts on the assumption that the *Mitâxarâ* is the 'paramount authority,' Goldstücker<sup>1</sup> should say that this work has been superseded, and Burnell<sup>2</sup> should declare it to be a purely speculative treatise, not a practical code, and another writer<sup>3</sup> should irreverently publish his belief that the people of South India care no more for the *Mitâxarâ* than they do for the Psalms of David. And so long as it remains doubtful whether Vijnânesvara's commentary is, or is not, a real authority obligatory on the Hindûs of this province, students of Hindû law will be perplexed and embarrassed, not knowing in what direction to push their inquiries. If we could only get this most important question set at rest by a competent investigator, real progress would at once become possible; and doubtless many persons, who hesitate now to enter upon a field of study that promises little but doubt and vexation, might be tempted to begin making some researches for themselves upon an assured basis. If it were definitively settled that the

<sup>1</sup> See his *Paper on the Hindoo Law*, of 1871, p. 3.

<sup>2</sup> Introduction to *Mâdhaviya*, xiii. Note to *Dâyadaççloki*, 4.

<sup>3</sup> Nelson, *View of the Hindoo Law*, p. 27.



*Mitâxarâ* is not an authority for South India, as a law-book, for any purpose or in any degree, curiosity would be aroused as to whether the *Smṛitichandrikâ* or any of the allied treatises is such an authority, or whether indeed any such authority exists or ever has existed, and, if not, as to where we should look for the principles of Hindû law. If, on the other hand, it turned out that Colebrooke was right after all in his rash guess, and that the *Mitâxarâ* in truth and in fact is the 'paramount authority' for Madras, intending students of Hindû law would at once attack the commentary with the full assurance that if they could only master its subject matter they might soon become experts in the sole remaining important part of Hindû law. Again, it might be discovered that a majority or minority of our Brahmans professed, and the rest repudiated, the doctrines contained in this celebrated work; and in that case, one by no means improbable, the fact would at once be perceived that different laws must be administered to different clans or fellowships of Brahmans, and that many a claim must be variously decided according as it is put forward by an *Âyyar* or an *Âyyangâr*, by an *Âpastamba* or a *Sâma-Vedî*.

As will have been gathered from what has been written above, I adhere to my belief that it is right to deny for the present all authority to the *Mitâxarâ* and kindred works, and to explode the notion of the existence of a Madras School of Hindû law; and in the event of it turning out, as I hope and expect, that there is no such thing as an authority upon matters of inheritance and succession for the Madras Province,

the future study of Hindû law will be immensely facilitated for South India. Instead of troubling himself with the pedantic disquisitions of the commentators, and their futile attempts to reconcile what is hopelessly irreconcilable, the cautious inquirer will turn the modern treatises to their legitimate use, that of illustrating the terse and ambiguous texts of the *Dharma-Sûtras* and *Śâstras*. Having mastered the principles of the original (or rather I should say of the earliest extant) works, he will go on to distinguish between the principal *Śâkhâs*, and to connect the *Sûtras* and *Śâstras* with *Śâkhâs* and *Charaṇas*. And lastly he will ascertain how far the Brahmans of the present generation govern themselves by the rules formerly followed by their several clans or fellowships; how far they have adopted, or unconsciously established for themselves, customs that are not sanctioned by, or even are inconsistent with, what is written.<sup>1</sup> The task may at the first blush seem to be very tedious and formidable. But if principles alone are looked for, and details put aside as useless, the business of reconstructing Hindû law on a sound basis will not, I am persuaded, be one of surpassing difficulty or of excessive labour.

<sup>1</sup> In his letter of June 8, 1812, given at II. Strange, 162, Ellis declared the truth to be that 'the law of the Smṛitis, unless under various modifications, has never been the law of the Tamil and cognate nations.' Similarly P. Samy Iyer, in his introduction to *True Hindû Law*, repudiates altogether the authority of the *Mitâksharâ*, *Dattakamîmâmsâ*, &c., and insists upon the validity of usage alone. He observes: 'No idea is yet duly formed of what Hindû law in theory is, since the decay of the Brahmanical government, and, *à fortiori*, since the new era, although usage has left no room to feel the want.'

## CHAPTER V.

*Law or usage part of religion—Vītas—Vrātyas—Possible origin of Buddhism—Jains heretic Buddhists—Jains and Brahmans driven into South India—Śaivites and Vaiṣṇavites—Other sects—South India Mlechcha—Its religious progress—The ‘Right’ and ‘Left Hands’—Antiquity of their antagonism—Origin of the divisions—Are the Panchāla Hindū?—Their polyandry, religion—The meaning of Drāviḍa—Origin of the Drāviḍas—The Tamils—The Āndhras—Their civilisation not Brahmanic—Work for the ethnologist—Ignorance about the Indians—Strata of population—Peculiar customs of the Western Coast—Marumakkattayam—Polyandry in South India—Succession in the female line—Illatā—Menarikam—Customs to be investigated.*

OUR next question is : (6) *To what extent have Brahmanism, Buddhism, and Jainism, respectively, acted and reacted upon the religious beliefs and practices of the population of South India? What should be understood at the present time by the term Hindū? Are the Vaiṣṇava, Śaiva, and other principal sects to be regarded as ‘Hindū’? What is the true history of the feud between the ‘Right Hand’ and the ‘Left Hand’? How far does the antagonism between these two great divisions of society extend—for example, does it preclude the members of one division from accepting and respecting religious, legal, and other works that are accepted by members of the other?*

In India, as Roer has justly observed,<sup>1</sup> ‘Law is entirely subservient to the mysterious despotism of

<sup>1</sup> Introduction, *Yājñavalkya*, vii.

caste, a religious rather than a political ordinance.' Probably we may go even farther than this and say, with a considerable amount of confidence, that in India, until the British took charge of the country, the only law known was the custom (*Āchâra*) of each caste, which custom was part and parcel of the religion (or superstition) of the particular caste, and was in no degree affected by changes in the political administration of any part of the country.<sup>1</sup> It is obvious, therefore, that in endeavouring to trace and investigate the sources of the Sanskrit Law, it will be absolutely necessary to pay special attention to modifications of it that may have been brought about by the development of successive religious systems, as the *Bauddha*, *Jaina*, *Saiva*, *Vaishṇava*, and others.

According to Weber, when the Âryans were living on the banks of the Indus, they were called *Viśas* or settlers simply, and the different families did not break up into classes of priests, warriors, and traders. It was not until after a further great migration had taken place eastward, that 'the four classes' somehow formed themselves. Part only of the population on the banks of the Indus left its ancient home, and part remained where it was, to keep up the old traditions and usages. Those who went seem to have hated those who staid, and the latter came to be known and derided as the *Vrâtinas* or *Vrâtyas*,<sup>2</sup>

<sup>1</sup> See as to this, Maine's *Early Hist. Institns.*, 13th Lecture.

<sup>2</sup> According to Manu (x. 23), '*Vrâtya*' meant properly 'excluded from the *gâyatri*.' In early times the term meant a non-Brahmanic Âryan. And provision was made for the admission of such a one into the pale by the sacrifice called *Vrâtya-stoma*. In later times degraded

the Western, non-Brahmanic Āryans, who obstinately refused to adopt the reforms of the emigrants, and clung to their own *Yaudhas* (warriors) and *Arhants* (teachers). And in the course of time these conservatives were considered to be no better than heretics, and were put on a par with Buddhists. Again, it is probable that of the immigrants into India proper, a part, possibly a not inconsiderable part, resisted with more or less pertinacity the new movement which had for its object the raising up of the Brahman into a distinct leading class ; and being discontented with what was going on, but unable to prevent it, took sides to some extent with the displaced inhabitants of the country, consisting of former Āryan immigrants, aborigines, and others, and ultimately with them became the *Śūdra* class.<sup>1</sup>

On the hypothesis that events like this occurred, and there is nothing improbable in it, doubtless it would be very easy to build up an interesting little account of the origin of Buddhism, which, according to Max Müller, grew up impalpably, a protest against a system that had tried to maintain its false position by an appeal to divine revelation. It might be provisionally shown, perhaps, that the 'white *Yajur-Veda*' was proclaimed about, or shortly after, the time of the main exodus from the valley of the Indus ; that the schismatic doctrines of Yājñavalkya were

Brahmanists also were known as '*Vrātyas*.' And youths who fail to get initiated at the proper time, 'fall outcasts from religion, degraded from the *gāyatrī*, and, if the *Vrātya-stoma* rite be not performed [they become], *Vrātyas*' (*Yāj.* i. 38).

<sup>1</sup> See Manu (x. 43 et seq.) as to the degradation of *Kṣhatriyas*.

adopted and improved upon by nonconformist *Kshatriyas*, who declined to admit the freshly announced supremacy of the Brahmins ;<sup>1</sup> that one of those *Kshatriyas*, Gautama (or a *Kshatriya* school of that name), gradually evolved and moulded into shape the ideas which subsequently became the basis of the Buddhist faith ; that it was in consequence of the King favouring the new heresy that a Brahmin minister caused him to be assassinated and supplanted by the *Mauryas* (Tartars of Merv ?), of whom Chandragupta<sup>2</sup> was the first king at *Pataliputra*, the capital of the Eastern Âryans ; and that it was that king's grandson, Asoka, who, after a tardy conversion, eventually made Buddhism to be the religion of the state.

Much of this fancy sketch probably would be wholly erroneous, but I imagine it to be tolerably safe to guess that the origin of the Buddhist faith was connected with the unwillingness of the *Kshatriya* part of the Eastern Âryans to admit the validity of the insufferable pretensions of the priesthood.

According to Burnell and Bühler the Jains were the heretical Buddhists excommunicated at the ' First Council.' And Burnell observes :<sup>3</sup> ' There is not much historical evidence to prove that there were Brahmins in South India before the seventh century A.D., and there is very little to indicate that there

<sup>1</sup> Weber (*Hist. Ind. Lit.*, p. 147) suggests that part of the *Atharva Veda* may have been taken from the *Vratyas* of the West.

<sup>2</sup> Chandragupta, according to Megasthenes, was king of the *Prasii* or *Praxii*, which word seems to be the Greek form of *Prachya*, or Eastern.

<sup>3</sup> *Palaography*, S. I., 12.

were Buddhists or Jains there before that date. The exodus of members of both sects from the favoured North to the unattractive South, was, probably, the result of political events in the former country. The Jains, as heretics, were most likely driven out by the orthodox Buddhists, and the Brahmans followed some centuries later, owing to the ceaseless conflicts that had disturbed their original friendliness with the Buddhists, and to foreign invasions.' It is to be observed, however, that when Hiouen Thsang in the middle of the seventh century visited the Telugu and Tamil countries, he found them overrun with *Digambara* heretics, who must have been Jains. He says nothing about finding Brahmans there. Thomas, in his recent work on Jainism, appears to endeavour to show that this religion was prior in origin to Buddhism, that the latter, indeed, was but an offshoot of the former ; and amongst other arguments adduces the (alleged) fact that the *Jaina* authorities universally take it for granted that the Chandragupta above mentioned was a Jainist.<sup>1</sup> And he declares that that king's grandson, Aśoka, professed the same faith. It is not necessary to consider here any intricate questions such as these. It is sufficient to observe that the history of the *Jaina* religion, when constructed, must be of prime importance to the student of Hindû law, because it will show beyond all possibility of doubt that Jainists are not Hindûs,<sup>2</sup> and cannot legally be subjected to the Hindû (*i.e.*, Sanskrit) law. And

<sup>1</sup> See p. 26.

<sup>2</sup> See the end of Chapter III., above.

a knowledge of *Jaina* writings<sup>1</sup> may lead to the rejection of various works now assumed to be authorities on Hindû law, *e.g.*, the *Mitâxarâ*.

We have seen above that the Śaivites, or particular votaries of Śiva, are suspiciously connected with Buddhism through the *Yâjñavalkya* School. And indications are not wanting in the writings of competent observers that at least some Śaiva sects are non-Brahmanic, and therefore not Hindû in the common acceptation of the term. Thus, for example, Buchanan was informed by natives, so he tells us at vol. ii. p. 70, that the great reformer Śaṅkara, who lived about a thousand years ago, destroyed twelve out of eighteen heretical sects, and allowed only six to continue to exist, namely, the *Bauddha*, *Jaina*, *Pâshandi*, *Chârvâka*, *Vemana*, and *Pashu* or *Ganapatiyam*. Of these the *Pâshandi*, he explains, 'include all the people who wear the *linga*, and the *Pandârams*, or all those that worship Śiva, and pretend to be exempted from the authority of the Brahmins.' And again at III. p. 265, he states that 'the *Vira-Śiva* reject altogether the Brahmins, and never employ them at any ceremony to read prayers.' This statement fully bears out what I have mentioned about

<sup>1</sup> It is observable, however, that Steele's *Hindoo Castes* states that the Jains of Poona, whilst they claimed to have books of their own, seemed to consult Brahmins on disputed points. And from Lord's *Display* (London, 1630, Chap. X.) it would seem that the author considered the Jain priests of Surat to form part of the Brahman body, though aware that by caste they were only *Sûdras*. An interesting case is reported at V. Sudder Dewanny Adawlut Reports, p. 276, in which Jaina books and Pandits were consulted about adoption, and Jains held to be heterodox Hindoos.



the *Lingayets* at the end of Chapter III. But the Vaishnavites, or votaries of Vishṇu, seem to be even less entitled to be considered Hindûs. According to an article in the *Calcutta Review*, vol. xv., on Chaitanya, that teacher, who is said to have been born in 1485, repudiated the system of caste, and, though himself a Brahman, mixed freely with men of all castes, and admitted even Mahomedans into the Vaishṇava society, if only they would profess *Bhakti*, or faith in the all-powerful name of Vishṇu or Kṛishṇa. And Buchanan, vol. i. pp. 323 *et seq.*, describes the *Sâtânîs*, or followers of Chaitanya, as calling themselves the *Vaishṇavam*, and living quite independently of the Brahmans and of caste-laws. A still more remarkable account of the *Bhaktâs* or Vaishnavites is given by an inscription preserved in the *Bengal Asiatic Researches*, vol. ix. p. 270, which declares that Bukha Rayer had held a council of *Āchâryas* and nobles for the purpose of settling the disputes that existed between the *Bhaktâs* and *Jains*, and upon inquiry had ascertained that in fact there was no distinction or contradiction between the religious opinions and usages of the two sects.

It seems to be at least doubtful, therefore, whether the two leading sects in South India, the *Vaishṇava* and *Śaiva*, can properly be said to be Hindû, and further it seems that they have heretical books of their own, which part of them regard with the same respect with which the orthodox Brahman regards the Vedas. These books, therefore, need to be perused and anxiously investigated by the zealous student of

Hindû law, who must by no means be content to assume that the *Dharmaśâstras* of the Brahmans are the sole repositories of the laws and usages of the country. The *Vemanas*, according to Buchanan, are atheists, whilst the *Ganapatiyas* deny the authority of the Vedas.

I observe that at III., 470, Buchanan states that before the time of the reformer Râmânûja the most prevailing sects in the districts lying west of Madras were the Buddhist and the *Chârvâka* (or Bull-worshipping), both of which, when he wrote, appeared to be quite extinct. With regard to these *Chârvâkas*, it is noticeable that Abraham Roger,<sup>1</sup> a Dutch clergyman who lived many years on the Coromandel Coast in the seventeenth century, and paid great attention to the religions and customs of the country, appears to have known of six sects of Brahmans, three of which were heretical and not numerous, namely, the *Chârvâka*, *Pâsanda*, and *Śâkta*. And Faria y Sousa, writing in the same century, stated <sup>2</sup> that : ‘ Many Princes think themselves descended from a Bull, because all men being destroyed, and only women left, one of them had carnal copulation with a bull, and brought forth a boy, who was the restorer of men.’ Possibly, therefore, the worship of the Bull, pure and simple, was the prevailing cult in South India when Jains and Brahmans first made their appearance there. It appears from a paper of Burnell’s <sup>3</sup> that, in 700 A.D.,

<sup>1</sup> See *La Porte Ouverte*, Amsterdam, 1670.

<sup>2</sup> At vol. ii., 403, by Stevens, 1695.

<sup>3</sup> In the first vol., *Indian Antiquary*.

Kumârila Bhaṭṭa considered the inhabitants of South India to be *Mlechcha* or barbarous, and recorded some Tamil words as curiosities of literature. But whatever may have been the opinion of the Brahmans of that time, Burnell has shown in his *Palæography of Southern India* that : ‘The North Indian civilization, when it got as far down in the Peninsula as the Tamil country, found there a people already in possession of the art of writing, and apparently a cultivated language. Thus Sanskrit . . . remained almost exclusively in the knowledge of the Brahmans.’ Moreover, as is shown by the passage from the same work cited above, the Jains had come before the Brahmans, and were already in possession of the field. And hence, doubtless, it was that, according to Ellis,<sup>1</sup> the Brahmans, though they succeeded in abolishing the Jaina faith, did not also succeed in fully introducing their own law in South India, but were compelled to wink at many inveterate practices. One would be glad to know how far these practices seem to be sanctioned by the Jaina law, and also whether the *Chârvâka* cult has left its mark on the usages and customs of the South, otherwise than in the shape of the vulgar worship of Śiva’s bull.

It is a remarkable fact that whilst many books, essays, and papers have been written by Europeans about the religion of the Brahmans and a few prominent heretical Indian sects, nothing appears to be known as yet about the religious or superstitious beliefs of the great masses of the people of this country.

<sup>1</sup> Madras Lit. Soc. Trans., Part i.

No competent inquirer appears to have made it his business to find out what is believed about God, the soul, a future world, &c., by the ordinary non-Muhammadan and non-Brahmanic tribes and castes of South India ; and it seems to be still doubtful whether they have any religion in the proper sense of the word, or whether, as I am inclined to suspect, they have not yet worked their way out of fetichism and the lowest forms of demonolatry. The Brahmans would never dream of imparting knowledge to the people at large ; indeed, they would regard as an unpardonable sinner one who attempted to instruct a man of another caste.<sup>1</sup> Moreover, they are, for the most part, themselves steeped in hopeless ignorance, and therefore quite incapable of teaching. Whence, then, could the masses have gotten any knowledge ? Is there any reasonable ground for hoping that the great bulk of the non-Āryan population of South India are, intellectually and morally, superior to the natives of South Africa or the Friendly Islands ? I fear there is none.<sup>2</sup>

Religion, caste, and law are so intimately bound up together in this country, that an inquirer about the law of South India assuredly must not neglect the shadowy and perplexing question of the '*Right and Left Hands*'—what are these bodies, how are they constituted, what is the hereditary antagonism be-

<sup>1</sup> That is to a *Śūdra*. See Manu, iv. 80-1.

<sup>2</sup> 'The Dravidian races of India (like all tribes with languages that do not denote sex) have only ancestor-worship for a religion, and could never (by themselves) get beyond it.' Burnell, Introduction to *Sāmavidhānabrāhmaṇa*, xii., note.

tween them, and how does that antagonism affect the body politic? Dubois and others have briefly noticed the fact of the existence of these two great divisions of the people, and the prevalence of serious quarrels between them, but no one has attempted to explain their origin or trace their history. The iron rule of the British Government succeeded without difficulty in repressing the violent disorders that used formerly to arise from quarrels between the 'hands,' and the majority of our present magistrates perhaps scarcely know the meaning of the phrase 'Right and Left Hands'; but under native administration such quarrels were of great moment, and in some instances, it is said, could not be settled without the active and lengthy intervention of considerable armies. For an interesting account of one of these disputes I would commend to my readers the second volume of Talboys Wheeler's *Madras in the Olden Time*, where they will find the history of a once famous petition presented to the Madras Government by 'the eighteen sorts of people of the right-hand castes of Chennapatnam' (Madras), and of the prodigious difficulties occasioned by it, which occupied the exclusive attention of the Council for many weeks. Unfortunately, however, they will look in vain there for a clue to the discovery of the operating causes that originally led nearly all the people of Madras to range themselves under the banners of the rival hands, and take part in what to Europeans seems a most senseless feud.

Different accounts are given of the constitution of

these bodies.<sup>1</sup> But it seems to be agreed that whilst the '*left hand*' everywhere comprises the '*Panchâla*,' or five guilds of goldsmiths, ironsmiths, coppersmiths, carpenters, and masons, together with the leather dressers and a few other insignificant castes, the '*right hand*' comprises all the principal castes of the country, though a few of them, such as the Brahmans, *Vellâlans*, and others, stand aloof when quarrels take place and profess to be neutral. In short, it is the principal artificers against the agricultural, mercantile, and other classes. Such a division of the community would appear to be by no means a new thing. On the contrary, we find it recorded in the *Mahâvansi*<sup>2</sup> that King Wijeya, who landed in Ceylon 'on the day of the death of Buddha,' sent an embassy to Madura, which brought back a Princess with 700 female attendants, and 'a train of men of eighteen different classes, and also five different classes of workmen.' It can hardly be doubted that the five classes here mentioned were the *Panchâla*, whilst the eighteen classes must have been 'the eighteen sorts of people of the right-hand castes' referred to in the

<sup>1</sup> Thus Buchanan (*Journey*, i. pp. 77-80) says that about Seringapatam the left hand comprises the *Panchâla*, *Chettis* (who claim to be *Vaiśyas*), weavers, &c., and Chucklers; and the right hand the eighteen castes generally, the Pariahs being its most active adherents. The division was said to have been ordered by *Kālî*, and the rules of the sides to be preserved on copper plates at *Kandi* (Kañjipuram?). Important disputes were referred for settlement to the hereditary chiefs of the sides, whose authority was supported by many of the ablest Government officials. Further on he says that the *Panchâla* all eat together, and intermarry, and any member adopts any one of the five occupations appropriate to the body. The hereditary chief is a goldsmith, who levies fines, which are presented to *Kālî*.

See Upham, p. 70.

petition aforesaid; that is to say, they must have comprised, according to the usual classification, the four pure classes, viz., the Brahmans and others, the twelve mixed classes (*Anuloma* and *Pratiloma*), and the two bastard classes known as *Kunda* and *Golaka*. In other words, we seem to have here a good authority for supposing that many hundreds of years ago the five classes of artificers formed a body quite separate and distinct from the general body of the people.

With regard to the origin of this separation or disunion, and of the uncompromising hostility and jealousy that seem ever to have marked it, I believe it was the writer of this who first suggested<sup>1</sup> that the feud may owe its origin to jealousy felt by the Brahmans against the smiths and carpenters because they 'wear the sacred thread, and commonly assume the titles of *Āchâri* or teacher and *Āyyar*<sup>2</sup> or lord.' This suggestion may appear to be not unreasonable, inasmuch as the obstinate resistance of the *Panchâla* to Brahmanic supremacy in any form is matter of notoriety. But I imagine now that the roots of the feud will be found to be much deeper down than this, and that in all probability the *Panchâla* of the present day stand without the Hindû pale because their ancestors from the very first always declined to enter it.

Some thirty years ago, if I mistake not, the *Panchâla* of Salem presented to Government a most remarkable petition, in which they complained of the

<sup>1</sup> In his *Madura Country*, Part ii.

<sup>2</sup> Properly *Ārya*?

injustice with which they were habitually treated, and for divers reasons claimed to be entitled to great pre-eminence and dignity amongst the castes. A copy of this petition, I imagine, might be obtained without very great difficulty, and a perusal of it might enable an acute inquirer to see his way towards solving an interesting problem. In Ceylon, it appears, the Goldsmiths are the third non-Brahmanic caste, the agricultural *Vellâlas* and the *Chalias* (weavers with gold thread) alone being superior to them. But in Bengal, so says the editor of Elphinstone's *History of India*, p. 61, n., the respectable divisions below the Brahmans are eleven in number, and after them come the 'numerous low castes, from whom a Brahman cannot accept water, such as the *Kaivârtika* or fisherman, *Suvarna-baniġ* or goldsmith,' &c., whilst one of the respectable castes is that of the *Karmakâra* or smith. And confer Hunter's *Orissa*, vol. i. 258. Apparently, therefore, the *Panchâla*, as we understand the term, are an institution confined to South India and the Maratha country, in which latter country, according to Wilson's *Glossary*, they wear the sacred thread. And they are not to be found in every part of the Madras Province, as we learn from Day's *Land of the Permauls*, p. 324, where there is an account of the 'four-joined-in-one' race on the Western Coast, which consists of four classes only, namely, the carpenters (*Āchâri*), brass-founders, smiths, and silversmiths, and does not include the masons. With this account may be compared a paper in my possession prepared by a Brahman well acquainted with the



Ceded Districts, which gives the following list of the castes forming the '*left hand*' in that part of the country, namely, gold-, iron-, and copper-smiths, carpenters, masons, dyers, *Devângas* (inferior weavers), Jains and *Bogars*, forest shepherds, goldfinders, and 'chucklers' or leather-dressers, and states that the first four wear the sacred thread. The masons, therefore, of the Ceded Districts are not on a par in this respect with the men of the associated crafts, and perhaps are not more nearly allied to them than are the masons of the Western Coast with the '*four-joined-in-one*.'

I have stated in the *Madura Country*, at Part ii. 70, that, according to a tradition current in the Madura District, the *Kammâlans* or *Panchâla* are descended from the offspring of a Brahman by a *Āṣṭi* woman; and that in Ceylon goldsmiths are called *Āchâriya*, masters, and *Guruvaras*, which means much the same. Now, if the artificers of Madura, as no doubt they do, consider *Āṣṭis* to be true *Vaiśyas*, they would be justified in claiming to belong (according to the *Anuloma* classification) to the very respectable mixed class styled *Ambasta*; and, if so, one can well understand their being exclusive and arrogant, and claiming to be far superior to all *Sûdras*, and not at all inferior to, if at all different from, true Brahmans. It would be interesting to get some accurate information about the origin and history of this group of castes: but what is more important for the law-student is the question of their religion—to what Hindû or heretical sect, if any, do they at present

belong ?<sup>1</sup> Is it true that they decline to avail themselves in the slightest degree of Brahmanic assistance in performing ceremonies and religious services ? Have they their own temples, and scriptures of their own, studied and expounded exclusively by their own *Gurus* and priests ? In short, do the *Panchāla* of Southern India generally form a separate and distinct non-Hindū body ?

Wilson in his *Glossary* states that in Mysore the *Panchāla* eat together and intermarry, and probably this would be found to be true everywhere, of such of them at least as wear the sacred thread. A much more important statement has been made about the artificers of the Western Coast by Faria y Sousa, II., 407, namely : ‘ Among silversmiths, blacksmiths, and founders, four brothers, or as many as there are, keep one wife between them, and have particular days assigned for each, that the inheritance may not be confounded.’ If this distinct allegation is true, that polyandry is practised as of course, not by an obscure and a degraded tribe, but by a whole group of leading castes, we may regard it as one of the highest moment. For, doubtless, it will be found that polyandry is practised by the *Panchāla* everywhere : and, if so, where may we not suspect its presence ? Dr. Cornish in his *Census Report*, 1874, speaks of ‘ the polyandrous habits of some of the sub-castes,’ and in my *View of the Hindū Law* I have suggested that ‘ poly-

<sup>1</sup> I understand that at Budwail, in the Cuddapah district, there is a *Brahmayamātham* for the carpenters, &c. Do they worship Brahma ? That might account for much.

andry in various forms is far more common in South India than has been supposed.' I shall have occasion to say more about this in a future chapter. In the meantime I must pass on to the consideration of another subject.

I have been informed that the ordinary worship conducted in the majority of the temples of South India is quite unconnected with Brahmanism, having been invented, modified, and matured by non-Brahmanic priests ; and that one of the most extensively prevalent forms of ritual, the *Chokalinga pūjā*, really is non-Hindū. However this may be, certainly inquiry should be made as to the nature of this and other local rituals. Two generations have passed since the unfortunate Ellis observed upon the precedence of low castes over Brahmans in superintending religious establishments in South India, and inferred from it and other things that the Brahmans had not succeeded in fully introducing the law of the *Smṛiti* in South India ; and still, so far as appears, no information is forthcoming as to the constitution and practices of religious establishments, and as to the Pagoda services, in the Madras Province. Should it be found, upon a proper inquiry, that the Brahmans do not frequent and have no concern in the management and ministrations of ninety-nine out of a hundred Madras Pagodas, it might reasonably be argued that the great bulk of the worshippers in Madras Pagodas are non-Hindū, and consequently not subject to the Hindū law. For, whatever Hindūism may be, we can hardly believe in the existence of a Hindūism en-

tirely divorced from and independent of Brahmanism. For myself, I cannot conceive the idea of a true 'Hindoo' who shall care nothing for the Vedas and *Śâstras*, and shall not regard the Brahmans as a sacred class possessing all knowledge and alone competent to instruct and save mankind. I must guard, however, against it being supposed that I believe that no Pagodas can be found in the Madras Province in which Brahmans officiate and manage affairs, and men of all the respectable castes attend the celebration of religious rites, properly conducted according to Brahmanic rules. Such Pagodas may, probably do, exist. All that I intend to suggest is, that such Pagodas are the exception, and probably are very rare; whilst the great majority of temples in South India are sacred to idols and demons of the most primitive (or most degraded) types, or are mere receptacles of fetiches. Hindûs other than Brahmans we may have in our midst—the question is, how numerous are they, what is their proportion to the general population?

By way of illustrating the difficulties that beset this part of the projected inquiry, I may mention here the curious fact that, according to Wilson's *Glossary*, the phrase *Panchama-Bânajiga*<sup>1</sup> denotes both an out-caste and one of the traders and religious persons of the *Lingait* sect, who are the heads of the right-hand

<sup>1</sup> Confer Buchanan, *Journey*, i. 238 *et seq.* He, too, says these tribes, which are very numerous, admit of no caste distinctions, and are the head of the right hand. Like all Saivites, they bury their dead, and never offer sacrifices; practise polygamy freely, but do not buy their wives; eat no flesh, and drink nothing intoxicating.

castes in Mysore. There is reason to suppose, therefore, that the Brahmans of Mysore, if not of other parts, consider the heads of the right or respectable 'hand' to be no better than outcastes. In conclusion, it may be remarked that the circumstance of a group of five castes belonging to the right hand (*Panchama-Bânajiga*) being opposed to a group of five castes belonging to the left hand (*Panchâla*) possibly may have given rise to the name of 'hands.'

The next topic for consideration is the following—(7) *What is meant by, and included in, the term Drâvida? What portions of the population of South India may be supposed to be Drâvida? What was the origin of the family? What its state of civilisation in early times? How have Brahmanism and Drâvidism acted and reacted on one another?*

It would be well to get some definite scientific meaning attached to the term '*Drâvida*.' I am aware that writers of repute object to the use of the term, on the ground that it is quite modern and scientifically valueless; but, nevertheless, I am of opinion that it needs investigation, and possibly might be found to be connected with historical truths of no little importance. At present there would seem to be almost as many meanings to the word '*Drâvida*' as there are writers who use it; and it is simply impossible for the student who comes across it to guess what it may stand for. Probably the largest signification of the term is that given to it by native writers who divide all Brahmans into two classes, to wit, the '*Five Gaudas*' and the '*Five Drâvidas*,' which latter class

is said to comprehend all Brahmans who belong to the Drâviḍa, Karnâṭa, Telinga, Gujerâta, and Marâṭha countries, and therefore the Brahmans of the Peninsula generally. This rough classification, one very commonly adopted, may be all one with that into Brahmans of the North and Brahmans of the South, which, as will have been seen from what has been written in an earlier chapter, was known to the author of the Baudhâyaṇa *Sûtra*, who has described several practices as being followed in the North but not in the South. And in modern times Ellis, amongst others, has called attention to the great difference observable between the *Gauda* and the *Drâviḍa* Brahmans, in respect of religion and law ; and has declared that by the latter are meant all who dwell south of an imaginary line drawn from the mouths of the Indus to Ganjam. So great was this difference in the eyes of this early observer, that he did not hesitate to state that the Brahmans never fully introduced the law of their *Smritis* into the South, and, though they succeeded in abolishing the Jaina faith, were compelled to wink at many inveterate practices of the people of South India.<sup>1</sup>

With this statement we may compare that at *Manu* x. 20, 22, 43, and 44, to the effect that the *Drâvidas* were sprung from *Vrâtya*<sup>2</sup> or out-caste Kshattriyas, and ‘by their omission of holy rites, and by seeing no *Brahmans*, have gradually sunk among men, to the lowest of the four classes.’ It would

<sup>1</sup> *Transactions Mad. Lit. Soc.*, Part i.

<sup>2</sup> See note 2, p. 89, above.

seem to be possible that when Brahmanism was fighting its way against all opposition in and around the Middle Country, the *Drâvidas* may have been a powerful Âryan tribe occupying lands to the south of that country, and may have acknowledged Brahman ascendancy for a time, and afterwards have rebelled and been driven southwards. Upon this hypothesis it would be moderately easy to account for what appears subsequently to have taken place. Unable to hold their own in the neighbourhood of the great Brahman territories, the *Drâvidas* would seem gradually to have spread themselves over the more fertile tracts of the Peninsula, and whilst engaged in impressing their culture and civilisation on the rude tribes with which they mixed, to have been assimilated and absorbed by those tribes. Among the principal results of this process may have been the contemporaneous formation of the *Drâvida* tongues, a comparative grammar of which has been put together by Caldwell, and the successive inventions of the early alphabets brought to notice by Burnell in his *Palæography of Southern India*. And, above all, to this dispersion of a great tribe, possibly, may be attributed the development of that civilisation which the Jains and Brahmans found established in South India, when they first made their appearance there a thousand years or so ago. Settling in the various *Drâvida* countries, the Brahmans naturally would be affected by existing institutions and practices, and in the course of time come to be known as the '*Five Drâvidas*.'

All this may be called pure speculation, and may

be wholly opposed to the truth ; but my sole desire is to suggest inquiry into what really has happened in connection with *Drâviḍa* colonisation, in order that the position and rights of the Brahmans of South India may come to be better understood. If, as we may suspect, these Brahmans have from the time of their first coming to the South completely dissociated themselves from their (alleged) brethren of the Middle Country, and have followed peculiar laws and customs of their own, it is quite certain that British courts of justice ought not to administer to them precisely the same laws that are administered to the Brahmans of the North. And, it seems to me, the solution of the question, how far the Brahmans of the South have dissociated themselves from those of the North, may be materially facilitated by research touching the *Drâviḍa* dispersion over and colonisation of the Peninsula.

One of the ' *Five Drâviḍa* ' families of Brahmans is, as we have seen above, the Maratha, and we learn from Hiouen Thsang's memoirs that *Cūlāditya*, the great Buddhist King of *Kanyâ-Kubja* of his time, had subdued all the kingdoms in his neighbourhood except the Maratha alone. Repeated onslaughts had done little or nothing towards the subjugation of the brave and peculiar people of that country, who appeared to have both the power and the will to retain their freedom. It would seem, therefore, to be very possible that the constant harassing of the Marathas in the seventh century may have occasioned extensive Brahman migrations into the South, and that the ' Five



Drāviḍas' (the Brahman families so called) may have sprung almost entirely from a Maratha stock, and thence derived the spirit of enterprise and boldness that has marked many southern Brahmans from the days of Śankarāchārya and Rāmānuja to the present time.

One of the restricted meanings of the term '*Drāviḍa*' is '*Tamīl*,' and Caldwell is of opinion that '*Drāviḍa*' and '*Tamīl*' are two forms of one and the same word, the latter being but a degradation of the former. This may be so, and it would be interesting to know how it came about (if it has come about) that the name '*Tamīl*' is proper now to one only of the numerous countries of the Peninsula. Burnell has shown<sup>1</sup> that about 700 A.D. Kumārila Bhaṭṭa held the people of South India to be '*Mlechcha*,'<sup>2</sup> or barbarous, and gave as specimens of their rude tongue several Tamil words in their existing modern forms. Burnell has further told us<sup>3</sup> that the same Brahman writer used the word *Āndhra-Drāviḍa* as the name of the language now called '*Tamīl*.' It would thus appear to be probable, or at the least not very improbable, that the present Tamil people represent a much greater people formerly known as the '*Āndhra*.' And as to this *Āndhra* people we have some information,

<sup>1</sup> In the *Indian Antiquary*, i. 310.

<sup>2</sup> Medhātithi, who is supposed to have flourished about 1000 A.D., observes (see *Manu* ii. 23) that certain tribes living near the bases of the Himalayas, to wit the *Polindas*, *Savaras*, and others, were '*Mlechcha*,' and not of the four classes; whereas now they are always assumed to be good Hindūs. What is the ground for the assumption?

<sup>3</sup> In the *Vyavahāra Nirṇaya*, Preface, vi. note.

possibly of a questionable character, to the effect that shortly before the Christian era *Ândhra* kings were very powerful ; and an *Ândhra* dynasty ruled at *Magadhâ*, over the 'holy land' of the Buddhists, having issued from the highlands south of *Kalinga*, between the *Kṛishṇa* and the *Godâvari* ; and the principal *Ândhra* capital was the famous *Varangal*, which was visited by Hiouen Thsang, and by him called *Ping-kilo*. For all which see Hiouen Thsang's *Memoirs* by Julien. It appears that when the great Chinese traveller journeyed through the South, he found the *Ândhra* country to be of comparatively small extent, and apparently unconnected with the country called *Drâvida*, of which the capital was *Kaṇḍipuram*, our 'Conjeveram.' And it may be supposed that in Hiouen Thsang's time, and before that of Kumârila Bhaṭṭa, the glory of the *Ândhra* over-lordship or empire had entirely passed away, and in the remaining *Ândhra* territories the Tamil had been superseded by the Telugu tongue.

To sum up : I imagine that inquiry into the history of the *Drâvidas* very possibly may establish the fact that the civilisation of South India, such as it is, sprang mainly from *Ândhra* sources, is essentially non-Brahmanic, indeed has always been antagonistic to Brahmanism, and is penetrated with Buddhistic and *Jaina* ideas. And if this fact were established, it would be indeed difficult for the upholders of the present judicial administration of South India to continue to advocate the forcing upon the non-Brahman

tribes and castes of this Province the cold obstruction of the Brahmanic law.<sup>1</sup>

Our next topic of inquiry is the following, namely—(8) *May the population of South India be made by any method of classification to sever into a few principal divisions, or will it be found on inquiry to consist of numberless independent and mutually repellent aggregates? Hitherto the inhabitants of the Western Coast have been assumed to be quite different and distinct from all other castes and tribes. Is the assumption warranted by facts, or do Western Coast practices, such as polyandry and succession in the female line, prevail elsewhere than on the Western Coast? To what extent do important customs, such as the preference of the son-in-law to the natural son as heir, and the custom of the father cohabiting with the son's wife, prevail?*

This very complex and difficult topic of inquiry is wholly for the ethnologists, who as yet have not done for India so much as might have been expected of them. Whatever good work may have been done for other Provinces, specialists have made no attempt to describe the varieties of the human race to be found in that of Madras. Until the Madras Census Report

<sup>1</sup> It is a remarkable fact that whilst the *Smṛitis* barely mention the *Śūdras*, and contemptuously prescribe for them one single duty, that of servitude and obedience, the *Nibandhas* ('digests') appear to recognise the necessity of attempting to bring the whole population within the operation of the Brahmanic law. The *Smṛitikaumudī*, by *Rāya Maṇapaḍa*, a late S. Indian work, described in Burnell's *Index to Tanjore MSS.*, refers only to *Śūdras*, whom the author divides into two classes, (1) original *Śūdras*, (2) those born of marriages between twice-born men and *Śūdra* women. 'These last he puts down as superior (in some cases) to the former; or, in other words, that they have more ceremonies to perform.'

of 1874 was published, the general public must have been in a state of complete ignorance as to the constitution and character of the considerable population of Madras. That highly interesting though necessarily very imperfect compilation has partially revealed the fact that the extensive territories governed from Fort Saint George are peopled by many hundreds, perhaps thousands, of separate and distinct castes, clans, tribes, and families, which have little or no connection, and for the most part will not intermarry, or even eat, with one another ; that less than four per centum of the whole population professes to be Brahman, whilst a very large proportion manifestly consists of 'low castes,' and the great bulk of it is unmistakably non-Âryan ; that the religions professed by it are numerous, though most of them practically are mere services of local demons ; and its habits and customs are infinitely various, nearly every subdivision of a petty caste appearing to have its own appropriate institutions and observances.

This scanty general information, together with a few particulars garnered in District Manuals, and in books like the Abbé Dubois' work, Caldwell's *Dravidian Grammar*, and Buchanan's *Journey*, constitutes at present all that is known to the public touching the ethnology of the Madras Province. As to the origin and history of each of the various aggregates of men with whom European officials, merchants, and missionaries may come in contact, as to their domestic practices, and their religious, ethic, and legal concepts, if any they have, absolutely nothing is known ;

and practically we are as ignorant to-day as were our ancestors three generations back about all that makes up the life and individuality of the Indians amongst whom we sojourn.

Palliation there may be or even excuse for this universal ignorance, but no man of generosity and reflectiveness, who may have had a sufficient opportunity of observing its effects upon the well-being of the people of the Madras Province, can fail deeply to regret its presence. It is felt at all times and in every department of Governmental action : but more especially and more keenly when legislation for the masses is attempted, and the Council takes its leaps in the dark. It is, therefore, very desirable that before the legislature shall think it necessary to inflict on the people of South India a handy little Code of Hindû law, put together perhaps upon the model of Cunningham's, some effort at least may be made to dispel the thick darkness that hangs round the matter of our present topic. It may not be necessary for this purpose to ascertain with precision how far the Turanian element may preponderate in the South Indian population, or who the *Pândyas* may have been, or what may mean Skythic remains on certain highlands. But it is essentially necessary, in my humble opinion, that some knowledge should be gotten of certain other matters of ethnology, and I purpose now to point out what those matters may be.

The first question to be examined in this connection, I think, is the following, namely : To what extent (if any) is it possible to trace successive homo-

geneous strata in the Madras population? For example, might our rude jungle tribes of woodmen, hunters, fishers, and the like, be grouped together as our earliest surviving aborigines? Do the prædial slaves of the various Districts represent the tribes that occupied the country before immigration from the North had begun? Do the proprietary cultivating tribes, such as the *Vellâḷans*,<sup>1</sup> *Kâpus*, *Nairs*, and others, represent yet another stratum? If a classification of this sort could be established, the acquirement of knowledge in respect to Indian usages and customs probably would be greatly facilitated, in that all new phenomena might be compared with, and differentiated from, the known phenomena of a single class, and not of the whole population, and we might study the broad characteristics of a few large groups rather than the peculiarities of a never-ending number of tribes or castes. But I am forced to doubt whether anything of the kind could be done. Difference of speech seems naturally to breed difference of habit, and I am inclined to imagine that the *Golla* or shepherd who speaks Telugu or Canarese may be found to differ from a Tamil *Idaiyan* as greatly as does a Scotch shepherd from a French. I hope it may not be so, but rather suspect that it will turn out to be the case, that the population of Madras consists of numberless independent and mutually repellent aggregates.

<sup>1</sup> This word means properly in Tamil '*flood-ruler*,' and would seem to be the appropriate name of the group of tribes which centuries ago introduced into the Tamil country what is called '*wet cultivation*,' which is carried on mainly by directing the floods of considerable rivers into channels and reservoirs made for irrigation.

On the other hand I see good reason to doubt the truth of the generally prevalent belief that the manners and customs of the inhabitants of the Western Coast are essentially and organically different, and in a very high degree, from the manners and customs of the people of South India generally. The Indians of the Western Coast unquestionably have their peculiarities, and, when the conformation and conditions of their country are considered, it would be indeed strange if such were not the case : but I take leave to doubt whether their peculiarities are so great as to warrant the High Court and writers on Hindû law in treating them as a special and unique community, entitled alone of all the tribes and castes of South India to have their customary observances habitually recognised and upheld by the courts of law. The *Nambûris* and *Nairs* <sup>1</sup> and *Tîyars* doubtless are peculiar in their ways, but then are they so very peculiar ? They may be—I do not say they are not—entitled to the full enjoyment of their ancient private institutions : the question is, are they alone entitled to such a privilege ? Ought not the *Raus* and *Naidus* and *Shânârs* also to be allowed a like privilege ? And the *Âyyangârs*, *Nâyakkans*, and *Nâdâns* ? Where should the line be drawn ?

<sup>1</sup> See Buchanan's *Journey*, ii. pp. 411 *et seq.* He says : 'Nairs marry before the age of ten ; but the husband, though he supports, never cohabits with, his wife, who takes for a paramour any high-caste man she may like. None knows his own father. And hence his sister's children always succeed to the estate of a deceased man, each being entitled to an equal share, whilst the most capable manages for all.' I doubt the truth of much of this. Do we yet know anything about Malabar customs ?

The Madras High Court would seem to have been induced to regard the Western Coast folk as separate and distinct from the rest of the population, by the circumstance that on the Western Coast prevails the usage, known as *Marumakkattâyam*, according to which the succession to property is always through females, if possible to the sister's son, *marumagan*. Of course, to one who has not at all observed the manners and customs of savages,<sup>1</sup> this may appear to be a very remarkable usage. But in fact there is nothing very extraordinary about it, and it would not be rash to predict that, when proper inquiry has been made, customs more or less akin to *Marumakkattâyam* will be found to obtain in many parts of South India, because there the primitive state of society still survives in which the father's right of property over the wife and child is not yet fully recognised, but both belong in a measure to the tribe or family.<sup>2</sup> I have noticed above the custom of goldsmiths and others having the wife common to a whole family, and in the *Madura Country* have given several instances of castes practising polyandry. The Madras Census Report tells the same story. And

<sup>1</sup> With regard to relationship in the female line being widely prevalent in early stages of society, see Lubbock, *Origin of Civilisation*, pp. 119-127. V. N. Mandlik (at *Hindû Law*, p. 397) states his opinion that the whole Chapter cxxii. of the *Mahābhārata Ādiparva* shows that 'the Northern Kurus were then what the Nairs are now, so that a man did not know his own father.'

<sup>2</sup> Confer the texts given in the *Dāyabhāga*, Chap. VI., Sec. ii., 23, 24, forbidding the partition of wives, but permitting the partition of other women. By the advice of his mother, Arjuna, it will be remembered, divided his wife Draupadi with his four brethren.



there can be no doubt that some forms of polyandry still flourish in South India.<sup>1</sup>

A most interesting letter<sup>2</sup> written by Father Bouchet in 1714 from Pondicherry to a great man in France, describes a custom obtaining in some of the petty kingdoms of South India. The right of succession, he states, comes only from the side of the mother ; and where the King has two children, one a daughter of the blood royal and the other a son not of that blood, the Princess succeeds.<sup>3</sup> She may marry whom she pleases, and even if her husband is not of the blood royal, her children will succeed through

<sup>1</sup> And see Mayne, Chapter iv. I do not think, however, that he goes far enough. Lubbock (at p. 117, *Origin of Civilisation*) observes : 'Polyandry is no doubt very widely distributed over India, Thibet, and Ceylon. In the latter island the joint husbands are always brothers.' The polyandry of the *devaddis* (idol-slaves), and other castes of dancing-women in South India, has not been philosophically investigated, and awaits proper treatment at the hands of a German. All *devaddis* are formally married in their childhood to an idol, and are very particular about their caste, which in the eyes of the people at large would seem to be by no means dishonourable. Indeed, having regard to their opulence, accomplishments, and orderly conduct in public, I should be disposed to imagine that, as did the Hetærae of Athens, these women stand high in public estimation. Certainly they are not common prostitutes. The attempt that recently has been made in Bombay to strip the dancing-woman of her status, and deny her the right of dealing with her own, according to the usages of her caste, is, in my humble opinion, highly improper and mischievous. Our intolerance of a morality other than our own brings about again and again the saddest results. Nor do we act consistently. We protect to the full the woman of the Western Coast, whilst we deny the commonest rights to the dancing-woman.

<sup>2</sup> See the *Lettres curieuses et édifiantes*, 1720, Rec. 14.

<sup>3</sup> So in *Brahmapura*, a kingdom of the North, according to Julien's *Hiouen Thsang*, ii. 232 : 'Depuis des siècles, c'est une femme qui règne ; aussi, dit-on, le royaume des femmes. Son mari a pareillement le titre de roi, mais il reste étranger aux affaires de l'état.' And Buchanan (*Journey*, ii. p. 3) says that *Madighesky* is called after a Poligar lady, and governed by *Ranis*.

her, the father's blood being of no account. With this may be compared what I have published in the *Madura Country* about the *Kunnuva Vellāḷans* and others doing certain things to keep the succession in the female line ; and in connection with this subject it would be profitable to know the precise character and extensiveness of the (alleged) custom of the *Vellāḷans* of Caroor, which is for the father always to cohabit with the female married when adult to his son whilst still infant, and which may be a form of polygamy or polyandry, or of the two together.<sup>1</sup> I have myself met with a case of a man of another tribe cohabiting with his son's widow, apparently according to the custom of his caste.

A widely prevalent custom, which however is not 'judicially recognised' by the Madras High Court, is that known in Telugu countries and elsewhere as '*Illāṭa*,' and which consists in the goodman of a house taking and rearing up a boy to be his son-in-law and successor in the management of the family property. The word '*Ill*,' house, seems to be connected with a group of concepts of a special character, one of which, '*Illarikam*,' denotes a connection of descent opposed to '*Mēnarikam*,' which latter seems to be a curious connection through the mother's brother, in castes which consider it proper for the sister's son to marry the brother's daughter, by force if necessary.<sup>2</sup>

<sup>1</sup> Shortt speaks of a similar custom prevailing amongst the *Reddis* of South India. *Trans. Ethn. Soc.* N.S., vii. 194. And probably it prevails amongst the *Kunnuva Vellāḷans* spoken of above.

<sup>2</sup> For example, among the *Buntars* of *Tuluva*. See Buchanan's *Journey*, iii. 16. With this compare the custom of the *Yerkalas* of South

Other strange customs affecting marriage and the constitution of the family may be found in abundance in South India. Some of them doubtless embody concepts peculiar to all earliest stages of society, and carefully looked into may serve to link together whole groups of tribes whose connection hitherto has not been suspected. Others of them may point unmistakably to an Ārya, others to a Drāviḍa, origin. All should be investigated. The essentially monogamous theory of marriage adopted, if I mistake not, by modern Sanskrit writers, is wholly irreconcilable with divers theories of marriage acted upon by non-Brahman tribes and castes resident in South India. And if so, it would seem to be not only absurd but monstrously unjust that our courts should administer indiscriminately to all non-Muhammadian litigants the Brahman law of succession and inheritance. As that eminent jurist, Holloway, J., once feelingly remarked, to do this is 'grotesquely absurd. It would be just as reasonable to give them the benefit of the Feudal Law of real property.'<sup>1</sup>

India, by which the maternal uncle may claim his sister's first two daughters as wives for his sons, paying for each only eight out of twenty pagodas, the market price. Shortt, *Trans. Ethn. Soc. N. S.*, vii. 187. Ellis (see Strange, ii. 165) says that in South India marriage with the daughter of the maternal uncle 'is considered incumbent.' And confer my *View of the Hindū Law*, pp. 92-3. V. N. Mandlik (at *Hindū Law*, pp. 415 *et seq.*) goes into the question at large.

<sup>1</sup> In the case reported at VI. M. H. C. R., 310.

## CHAPTER VI.

*The Thessa-Waleme—Position of Tamil women in Ceylon—Subordination of sons—Adoption—Bouchet's letter—Daughters do not inherit—United families—Division—Fathers' debts—Orphans—Adoption—Oppâri—Steele's Hindoo Castes—Polygamy, remarriage, local usages opposed to the Śāstras—The Abbé Dubois—Customs of Mysore—Boulnois and Rattigan's customary law in the Panjâb—The Village communal system—Joint ownership—The Ghar-jawai—Law in the French territories—The Nibandhas—Custom—Do Brahmans go by their Śākhās?—We know nothing about them—Rogerius about marriage—Marco Polo—Adoption not a religious practice, but a natural—Instance of adoption of a girl—Doctrine of survivorship—The mother and widow go shares—Duty of performing obsequies—The pinda—The Hell called Put—Early forms of wills—The Upanayana—Indians do not live like Brahmans—Concubinage—Incest—Marriage of widows—The Community—An unheard-of beastliness.*

It would be impossible for a student who undertakes to investigate in a comprehensive and philosophic spirit the manners and customs of the people of South India, to neglect our next topic of inquiry, which is—(9) *A few collections of usages and customs of so-called Hindûs exist and are accessible, as Boulnois and Rattigan's, Steele's, that of the Ceylon Tamils, and perhaps some few others. How far do they resemble and differ from one another? And to what extent, if any, do the rules contained in them appear to be based upon, or sanctioned by, the received Hindû law-books? Or appear to agree with such notices of local usages and customs as are found in Hindû law-books?*

Possibly the most complete collection of Indian

laws and customs in existence is the '*Thessa Waleme*,' or country law observed by the Tamils of Ceylon, a copy of which in English is given in Byerley Thompson's *Institutes of the Laws of Ceylon*. In that fortunate island the Government has never paid Brahman Pandits to forge legal fetters for the people, and so far back as on September 23, 1799, the validity and authority of the customary law of the Tamils was confirmed by proclamation.<sup>1</sup> On perusing this remarkable and very interesting compilation, what principally struck me was the extreme care with which the wife's rights of all kinds appear to be protected. Far from being treated as a slave and drudge, or being classed with infants and lunatics, the Tamil wife would appear to enjoy a position of liberty and dignity such as perhaps is accorded to women in but few European countries. Thus it is expressly provided that upon the death of a man leaving an infant or infants, his widow succeeds to the estate, and 'the son or sons may not demand anything so long as the mother lives ;' <sup>2</sup> whilst, on the other hand, she is bound to give dowries with her girls. Provision is made for the remarriage of the widowed mother of a family.<sup>3</sup> And she is at liberty to adopt a child, to succeed to her own property.<sup>4</sup>

<sup>1</sup> Mayne states at p. 35 that this collection of customs was made in 1707, under the orders of the Dutch Government.

<sup>2</sup> I strongly suspect this to be the real law in nearly all the castes in South India. Of course the widow so succeeding may not make away with the estate.

<sup>3</sup> Mayne (§ 87) thinks that formerly it was the law for all Tamils that widows might remarry. I do not doubt it.

<sup>4</sup> Compare with the *Kritrima* form of adoption, said to be now

The dependent position of sons is very clearly marked out. 'So long as the parents live, the sons may not claim anything whatsoever ; on the contrary, they are bound to bring into the common estate (and there let to remain) all that they have gained or earned during the whole term of their bachelorship.' And again, 'Although the parents do not leave anything, the sons are nevertheless bound to pay the debts contracted by their parents ; and although the sons have not at the time the means of paying such debts, they nevertheless remain at all times accountable for the same ; which usage is a hard measure, though according to the laws of the country.'<sup>1</sup> So long as the parents remain fit for the conduct of affairs, the sons have no concern in the management of the family business, but the old age and incompetency of the parents leads to 'division' amongst the sons, for the purpose of enabling them the better to support and maintain the parents. The sons often fail in this their duty, and disputes are bred, and the parents take revenge on their undutiful offspring ;

peculiar to Mithilâ, and by which a woman may adopt to herself, Sutherland's *Synopsis*, note v. Mayne (at p. 86) says of it : 'It has no connection with religious ideas, and is wholly non-Brahmanical.' Sed quære. Mithilâ always was a stronghold of Brahmanism. Observe that nothing is said about a widow adopting to her husband. I cannot understand how the belief has come about amongst English lawyers that a Hindû widow may adopt to her husband : so far as I can see, this belief is entirely opposed to Hindû ideas.

<sup>1</sup> Compare II. Strange, 274-6. Ellis appears to have remarked, as touching the Pandit's answer, that the general obligation on the son to pay the father's debts is independent of assets, that 'the law seems hard, but it is the law. *Pitarunavan Satru* : "A father in debt is an enemy to his son," says the Sanskrit proverb.' The Madras High Court has utterly abrogated this law. See my *View*, p. 67 ; and Mayne, § 276.

and to meet this state of things certain provisions of the law have been devised.

The customs relating to adoption are curious. As has been shown above, a wife acting alone may adopt as for her own property. And two children, for instance a boy and a girl not related to one another, may be adopted by a man and his wife at the same time. And a man may adopt a girl belonging to a caste other than his. The descent of property in the case of adoption is carefully regulated; and, to prevent injustice, the consent of near relatives to a proposed adoption is made obligatory.<sup>1</sup>

Such are a few of the more important rules of the *Thessa Waleme*. Marred by numerous defects, the work nevertheless appears to be as a whole useful and satisfactory, and doubtless it would have been well for the Tamils of South India if their customs had been collected in as good a form before the beginning of this century. It is not too late to do the thing now, and one may yet hope to see the Madras Government undertake the work of gathering together and confirming a body of local customary law.

With the *Thessa Waleme* may be compared what Father Bouchet has recorded in the letter <sup>2</sup> cited in my

<sup>1</sup> This is most interesting and important. As will be seen below, this consent was necessary in South India also, and for a very sufficient reason, namely, that the kinsmen's rights would be affected by the introduction of a stranger into their family.

<sup>2</sup> This long and very remarkable letter of the year 1720, which fortunately has been preserved in the *Lettres curieuses et édifiantes*, contains most valuable matter. It begins by stating that the Indians of the South, 'Ont ni Code ni Digeste, ni aucun livre où soient écrites les Loix auxquelles ils doivent se conformer pour terminer les différends qui nais-

last chapter, though it must be remembered that the *Mission du Maduré* makes it highly probable that the Jesuit missionaries of South India got their information chiefly from Brahmans and Telugus,<sup>1</sup> and to a very slight extent from ordinary Tamils. Father Bouchet tells us that the daughters of a family had no claim to a share in the inheritance, because their relatives were charged with the duty of transferring them in marriage to other families of equal rank with their own.<sup>2</sup> But in certain royal families the females were preferred to the males in the matter of succession. And in ordinary families it often happened that a capable female managed all the affairs of a group of families. The writer of the letter had known such a one charged with the maintenance and support of more than ninety individuals.

sent dans les familles.' But they had '*maxims*,' handed down orally from father to son. Some of these it gives and explains very satisfactorily. It appears that Bouchet sometimes asked why the customs of the country had never been collected and reduced to writing, and was told that, if that were done, knowledge of them would be confined to the learned few, instead of continuing to be common to all.

<sup>1</sup> Who for centuries were the rulers of the Madura kingdom. See the *Madura Country*, Part iii.

<sup>2</sup> This, according to Mayne (§ 406), is the modern doctrine, and modern practice 'is in conformity with this opinion.' Mayne may be correct upon the point, but the *Mitākṣarā* (Chap. i., Sec. vii.) argues strongly in favour of the old law—that a daughter shall get, upon a partition after the decease of the father, a full quarter of a share; and I do not understand § 25 of the *Mādḥaviyam* absolutely to deny such share, though it denies the daughter's right to succeed. The very interesting 7th Section of the *Dattakamīmāṃsā* appears to be intended to demonstrate that daughters are issue even as sons are, and that as the son is heir, so the daughter is heiress; she is not, as 'some' think, to be excluded from inheritance. The *Dāyabhāga* seems to go against her, but the *Dāyakramasangraha* does not. I should say that the right of the daughter to succeed upon a partition still is an open question.



In this writer's time 'division' rarely took place. When it did, it was upon the death of the father. When the brothers continued to live together in union, whatever one of them earned was thrown into the common stock, and enjoyed equally by all. On the other hand, upon a division taking place, any brother who was supposed to be wanting in intelligence was allowed a much larger share than the others, since they might be expected to make their fortunes by their personal exertions, whilst he might not be expected to do much for himself.

As regards the payment of debts, it appears that the father was obliged in all cases to pay any debts contracted by the son, and children were in like manner obliged to pay all the debts of their father. It was quite immaterial for what purposes the money had been borrowed, whether for necessary expenses or for indulgence in vice. Connected with this rule was one to the effect that in no case, for no reason, could a father disinherit his son,<sup>1</sup> or a son his father. In default of male issue, a man's father was his natural heir, and nothing could deprive the father of such his right. Where a family of brothers was managed by the eldest, he was treated by the rest with the utmost respect, as if he were their father. And, like a father, he was bound to pay the debts of the others, and to treat a spendthrift with exactly the same indulgence as his more prudent brethren.

Father Bouchet has given us some curious infor-

<sup>1</sup> This is directly opposed to the Sanskrit law, as it is to common sense. See, for example, *Mit.* ii. 10.

mation touching orphans and adoption. Uncles and aunts, he observes, were regarded by the law as the fathers and mothers of their brothers' and sisters' children respectively, and therefore were obliged to rear them, when left orphans, as their own. In connection with this, it may be observed that in South India ordinary natives invariably speak of their uncles as of their fathers, and of their aunts as of their mothers.<sup>1</sup> The reason of this no doubt is, that the primitive idea of the child belonging to a tribe or family, rather than to his parents, still survives in this part of the world.

When an orphan had no elder brother, uncle, or aunt, a family council met and appointed a guardian for him, and prepared a deed showing the nature and extent of the child's property. With regard to adopted children, Father Bouchet says : ' They enter into the partition of the goods equally with the children of the fathers and mothers who have adopted them.' The ceremony of adoption was very simple. The adoptive father's relatives having been convened, the child was placed or made to stand in a large copper dish, and the adoptive father and mother spoke to this effect : ' We inform you that, having no child, we wish to adopt this one. We choose him

<sup>1</sup> A Tamil habitually calls by the name '*Thaghappan*,' or father, his father, his father's brother, his father's father's brother's son, and others. By '*Tháy*,' mother, he means his mother, mother's sister, father's brother's wife, mother's mother's sister's daughter, and others. This is not in the least owing to the poverty of his language, which always calls by separate names different species of a genus. A similar system prevails amongst the Iroquois and Hurons. See Lubbock, *Origin of Civilisation*, pp. 127, 8. I have heard a Tamil call his little son 'brother.'

for our child in this wise, that our goods shall belong to him henceforth as if he were actually born of us. He has now nothing to hope for from his own father. In token whereof we are now going to drink saffron water if you consent.'<sup>1</sup> Those present signified consent by moving their heads, and thereupon the adoptive father and mother laved the child's feet with saffron water from a vase, and drank part of what remained therein, and the ceremony was complete. The act was then recorded in a deed, to be signed by witnesses. No allusion is made in this account to the assistance of Brahmans, or to any supposed spiritual efficacy of the act,<sup>2</sup> or to the need of any person formally 'giving' the child. Father Bouchet adds that if the adoptive father and mother subsequently have natural children, those 'will be subordinate to the adopted, inasmuch as the laws make no difference between the adopted and the real child.'<sup>3</sup> Another kind of adoption commonly practised was that known as the '*Oppâri*,' or re-

<sup>1</sup> See note 1, at p. 124, above, as to the consent of the kinsmen. The only ceremonial act spoken of in the *Thessa Waleme* is the drinking of the saffron water. Compare Sutherland's notes on the *Kṛtrima* form of adoption.

<sup>2</sup> Compare what is said about the Jains and Lingayets at the end of Chap. III. Sec. vii. of the *Dattakamimāmsā* seems to be intended to show that a daughter serves to 'prolong lineage,' and save from torments, equally with a son; and, in default of a legitimate daughter, a substitute will serve. The whole section is very remarkable and important, and seems not to have been sufficiently considered.

<sup>3</sup> So among the Esquimaux, Captain Lyon tells us, 'this curious connection binds the parties as firmly together as the ties of blood; and an adopted son, if senior to one by nature, is the heir to all the family riches.' Lubbock, *Origin of Civilisation*, p. 75. The 'frequency of adoption among the lower races of men' is spoken of by Lubbock, *ubi supra*.

semblance.<sup>1</sup> When a dearly loved relative was lost, whether a child or a brother or a sister, the bereaved would often adopt in lieu of the departed one a person supposed strongly to resemble him or her in personal appearance. A Śūdra might adopt a Brahman by *Oppâri*, and in such case the adoptee would show all proper respect to the adopter, though of course he might not eat with him. The death of the adopter by *Oppâri* dissolved the tie, and the adopted did not inherit to him.

For purposes of comparison, Poona may perhaps be thought to be very distant from Madras, but both these towns are within the limits of the old *Drâvida* settlements, and it has been suggested above that the *Pâncha Drâvida* Brahmans may have spread out originally from the Maratha country: we may, therefore, look not without profit to Poona for light by which to understand the Hindû law of Madras. That very suggestive but merely fragmentary work, Steele's *Hindoo Castes*, contains numerous allusions to usages and customs that may be found to prevail extensively in the Madras Province as well as near Bombay; and some very important answers made by assembled castes to questions put by British officers, about matters of law and custom. Thus, for example, the work shows that polygamy is practised to a very great extent; that widows and wives are in certain circumstances permitted to remarry; that a virtuous wife need not desert her out-caste

<sup>1</sup> I am told that Tamil women still use this expression, but that it means no more than an ordinary term of endearment.

husband ; that a person does not by exclusion from caste forfeit his rights of inheritance ; and that the custom of the country has sanctioned many things that are opposed to the *Śâstras*.

The authority and the usefulness of the *Hindoo Castes* are greatly restricted by the circumstance that the Governmental inquiry, upon which the work is grounded, was confined almost exclusively to the neighbourhoods of Poona and Sattara, instead of being extended, as it should have been, throughout the whole of the Bombay Province. But partial and inadequate as it was, the inquiry served to make certain matters clear ; and amongst other things we have the important declaration that, whilst Brahmans are obliged to act up to the letter of the *Śâstras*, 'in other castes the rules of the *Śâstras* are modified by local usages and the custom of the country.' As to this, it is to be observed that the words used would appear to be inappropriate, when we consider the tenour of statements to be found in other parts of the book. For example, at page 122 it is recorded that fifty-six castes at Poona made answer to the effect that they possessed no written documents or books to refer to as authorities on points of disputed custom ; and 'ancient usage, as determined by the caste on creditable evidence, is the general guide.' So at Khandesh there are no written rules, nothing but usage. And at Sattara there are 'no written rules but the *Śâstra*,' whatever that may mean ; and 'cases unprovided for are determined by an assembly of the caste, when the decision becomes in future a

precedent equal to law. Custom has sanctioned many things in opposition to the *Śāstra*.' Reading these with other passages between the lines, I see good reason to suspect that at all events the non-Brahman castes of the Bombay Province, though possibly they may profess to be guided by certain vague rules that never have been written, in truth and in fact conduct their affairs for the most part as each man may think fit, and quite untrammelled by rules of any sort or kind, excepting always a few that relate to eating and drinking, and 'pollution' generally.

The little that the Abbé Dubois tells us about the laws and customs of the Mysore country is by no means without value. As I have already observed, he appears to have known nothing of the existence of any law-books except the '*Directory or Ritual of the Purohitas*,' if that be one; and declares that in India 'there is no public system of law; and custom, as various as the tribes, regulates everything.' The few specimens of laws he gives us<sup>1</sup> are sufficiently remarkable. One is that girls sometimes are adopted.<sup>2</sup> Another is that the mother

<sup>1</sup> At pp. 184 *et seq.*

<sup>2</sup> For a modern instance of this see below. The whole of Sec. vii. of the *Dattakamīmāṃsā* deals with the different substitutes for the legitimate daughter. Excellent authority is given in it for the daughter 'given,' and the daughter 'purchased,' &c. Its opening verses show that the progeny which men desire and need is either male or female; and that he who is doomed to fall to a region of horror by reason of his not having produced issue, is he who has produced neither sons nor daughters. The term *apatya*, i.e., that through which man obtains exemption from falling into Hell, 'applies to the two sexes.' It would seem as though Strange and others have attributed a wholly unwarranted pre-eminence

gets no share of the family estate; nor does the widow of a divided brother, nor a daughter. Where the second eldest of three brothers dies, his widow must be supported not by the eldest but by the youngest, who takes his estate. And the industrious members of a family are obliged to pay the debts of their spendthrift coparceners. Such appear to have been some of the rules of law supposed to be current in the Mysore country at the beginning of this century. But it is significantly added: 'The relatives assembled decide any dispute, according to the rules of the country or the caste, and more frequently still according to the wealth and generosity of him who best rewards them for a favourable decision.' In Mysore, apparently, as in the Bombay Province, but a very slight amount of Hindû law has been in force: custom is all-powerful, and custom often is made out to be very much what the wealthy and powerful may desire it to be.

Boulnois and Rattigan's *Notes on Customary Law* as administered in the Panjâb contains much useful matter, going to show that in that part of India the population has not accepted the Brahmanic law, and clings persistently to a medley of peculiar customs of its own that have been modified by Hindûism, Mahomedanism, and Sikhism, and possibly by other religions also. As we have already seen, the Âryans

in spiritual efficacy to the son of the body. I take it that a son who fails in filial duty, and is unlearned, and therefore an 'enemy to his father,' is no *putra* or deliverer, and may properly be excluded from inheritance in favour even of a stranger. See *Mit.* ii. 10. In other words, a son is not necessarily a *putra*, a *putra* is not necessarily a son.

who migrated from the banks of the Indus to those of the Ganges, soon began to regard their Western brethren with aversion, as heretics ; and, therefore, naturally we should not expect to find the present inhabitants of the Panjâb orthodox Hindûs. But, after reading this work, I venture to doubt whether the bulk of the population of the Panjâb can properly be called Hindû. Amongst other things, this book tells us that the customary law of succession relates mainly to the inheritance of land, and 'cannot be considered, for practical purposes, apart from the village communal system.' For 'the law of the people at large is, in the main, the custom of the village communities.' And thus the vital principle of joint ownership may continue to operate in favour of a sub-family long after its separation from the main branch has taken place. As a rule, daughters and sisters are excluded from the inheritance, and must be provided with dowries. A custom similar to the '*Illatā*' of South India, and similarly named from the 'house,' the '*Ghar-jawai*,' gives the right of succession to the son-in-law. I observe, by the way, that this word is stated in Wilson's *Glossary* to be Maratha : the custom, therefore, may be *Drâvidian*. Widows are allowed to remarry in the Panjâb. Sisters' sons are adopted. Individual members of a family by custom do not aliene property. Men marry their brothers' widows. Deserted wives marry again during the lifetime of their first husbands. And, on the whole, people seem to do very much what they please ; provided always that the act does not



infringe the law of the village community, and (I presume) does not bring about 'pollution,' by contact with unclean persons or things.

I had hoped to be able to compare with these collections of customs something of the kind prepared in the French territories. But in this I have been disappointed. Judging from what I have been able to learn about Franco-HindŪ law, Pondicherry has derived almost all her inspiration touching the laws and customs of the HindŪs from the same old-fashioned sources to which Madras has hitherto been content to resort. Indeed, the preface to the *Manuel du droit indou* admits that the work is grounded on Calcutta and Madras decisions, 'as well as the works of Macnaghten, Strange, Grady, and other eminent jurisconsults.' The Portuguese, the Danes, and the Dutch had not the advantage of consulting these masters, and probably Goa, Calicut, Tranquebar, and Negapatam might be made to yield some valuable matter in the shape of ancient decisions and regulations.

But a richer, and happily a more accessible, harvest may be gathered from the *Nibandhas* or Law Digests, most of which, as Burnell informs us,<sup>1</sup> contain a chapter (styled *Deśa-nirṇaya*) on the peculiar customs of kingdoms; whilst in the *Smṛiti-Chandrikā* this chapter is pretty full. Most of the chapters remain as yet untranslated, but a translation of parts of the *Deśa-Dharma* chapter of the *Smṛiti-Chandrikā*, by Burnell, is to be found in my *View of the HindŪ*

<sup>1</sup> *Ind. Antiquary*, i. 3, 10.

*Law*, at pp. 115–7. The conclusion that I arrived at upon a consideration thereof is the following : ‘The most important of all principles of Hindû law I take to be that—Whatever rule of conduct may appear to be prescribed by a Sanskrit law-book, or by all or most Sanskrit law-books, if the sovereign finds that there exists in any country a custom opposed to and incompatible with such rule, in that country such rule must not be enforced : the opposite custom must be upheld, and the minds of men must not be agitated by an attempt to take from them a state of things to which they are used.’ And Barth’s elaborate notice of the *View of the Hindû Law*, in the *Revue Critique* of June 1878, winds up with the following observation : ‘Sur ce dernier point’—the impropriety of applying the law of the Smritis to the general population of Madras—‘comme en général partout où il se maintient sur le terrain pratique, la position de M. Nelson semble inattaquable, et on a de la peine à s’expliquer après l’avoir lu, comment des jurisconsultes éminents ont pu imaginer et maintenir si longtemps une jurisprudence également contraire et aux droits des indigènes, et aux maximes de l’administration britannique.’

Our next topic of inquiry is—(10) *Brahmans ought to govern themselves by their respective Śākhās—do they? What are their usages and customs? To what extent do the usages and customs of Āyāngārs, for example, differ from those of Āyyars, Raus, and other divisions of Southern Brahmans? In what re-*

*spects and to what extent do the usages and customs of the principal non-Brahman castes, e.g. the Chettis and Mudalis, differ from those of the Brahmans and of one another? What are the most remarkable of the usages and customs of non-Brahman castes, and how far are they consistent or inconsistent with the Hindû religion and status?*

I have shown in the Third Chapter what the term 'Śākhā' generally is supposed to mean and include, its simplest signification being 'branch,' i.e. of the Veda. The term '*Charana*,' I have also shown, means a religious fellowship or school, that possessed and adhered to a particular Śākhā, and studied its own *Sūtra* works. And I have pointed out in the Second Chapter that it is desirable to know whether the quasi-laws of the *Charanas* have yet wholly ceased to operate. Whether they have or have not, it seems to be clear that the Brahmans of the present day ought to govern themselves by their respective Śākhās; and it is essentially necessary to get accurate information as to whether they in fact do so govern themselves. I observe that in the grant, given at *Indian Antiquary*, ii. p. 371, of the Venkapat Rayar who reigned at Chendragiri so recently as at the beginning of the seventeenth century, the grantee claims to be of the *Yajuh Śākhā*, of the *Āpastamba Sūtra* and of the race of Vatsa. And ordinary Brahmans with whom I have conversed appear to be tolerably familiar with the terms Śākhā and *Sūtra*, though of course quite ignorant of their history and meaning. It seems to be not impossible, therefore,

that Brahmans may govern themselves as they ought, and pay proper respect and obedience to the ordinances prescribed for their progenitors of a hundred generations back.

But experience has made me greatly sceptical as to Brahmans doing anything that theoretically they ought to do. With them, as with other folk, the old order changes, giving place to the new, and day by day the links that bind them to the past grow weaker. If Bernier can be believed, Brahman learning must have been all but dead at Benares, the Athens of India, 'the general school of the Hindoos,' when he was sojourning there more than two centuries ago. And the events of the last two centuries can hardly have favoured the revival of a learning that accomplished its work ages since, and no longer has a *raison d'être*. I may be entirely mistaken, but I strongly suspect that Brahmanism, with its ancient faith and institutions, practically is dead; and that *Śākhās* and *Sūtras* exist but as shades, bereft of energy, powerless to bind or coerce.

How then do the modern Brahmans of South India govern themselves in civil matters? What are their usages and customs? I am persuaded that no European knows: possibly no man knows. Everybody who has read Dubois' work, and bits of Buchanan, Elphinstone, and a few more authors of repute, imagines that he knows all about the Brahmans, and that nothing new can be said about them. The truth is, however, that accurate information about the social phenomena of this singular and most

interesting division of the human race is nowhere to be found, and that hardly a single statement concerning its manner of living can safely be accepted as absolutely and universally true. Nor is the reason of this hard to discover. All Europeans who write about the Brahmans or the Hindûs get their information from one of two sources : they either consult intelligent natives, or refer to a few of the better-known Sanskrit books ; and in either case the result is the same. If they do the former, their informants will tell them not what is, but what according to the books ought to be : if they do the latter, they will learn not what is (or ever has been) the state of things, but what writers who lived one or two or three thousand years ago have thought would be a convenient and proper state of things, from the Brahmanic, or Buddhistic, or some other point of view. As regards native informants, I am not of the number of those who think that they deliberately and maliciously mislead. But their minds are so firmly shackled by conventionalism, so wanting in healthy curiosity, and so averse to effort, that they will always prefer to tell one what their ancestors may have thought and said, rather than what they themselves may have observed and reflected on. As an instance of this proclivity, I will adduce what a Brahman official told me only a few months ago. Speaking of the seclusion of females, he remarked on the helplessness and natural wickedness of the sex, and gave it as his opinion that a woman should never be allowed her liberty ; however old, she would

still be vicious. Upon inquiry it turned out, as I expected, that this advanced misogynist had had no specially painful experiences of his own, but had been struck by what he had recently read about women in *Menu's Code*.

Abraham Roger, better known (I believe) as Rogerius, once a great authority, and to whom reference has been made before, after living for many years on and near the Coromandel Coast, recorded that Brahmans may marry as many women as they choose, and women of other classes, though the union of a Brahman with a Śûdra is considered objectionable; and that a Brahman sometimes had two or three sisters for his wives at the same time. Now, what are we to think of these statements? Or rather of the statement that a Brahman may marry a woman of another class, even a Śûdra? Did the worthy pastor get it out of *Menu's Code*? Or is it possible that some families of Brahmans still follow the ancient practice of taking wives from all the classes?<sup>1</sup> Native friends tell me that for sundry good and sufficient reasons (deduced of course from the Vedas) the wedding of a Brahman and a non-Brahman woman is a sheer impossibility.<sup>2</sup> But doubtless they would tell me the same about the wedding of a Mussulman and a Rajput woman, a thing that not unfrequently happens in the Panjâb.

<sup>1</sup> See p. 33, above.

<sup>2</sup> But the *Smṛitikaumudī*, quite a late South Indian work, referred to at p. 112, note 1, expressly refers to mixed marriages, and provides for the results of them. And so does the *Dâyadaçâçloki*, which Burnell thinks is not above a century old.

How far polygamy is practised by the Brahmins of to-day we have no means of guessing. The current hypothesis seems to be that a Brahmin's marriage is sacred and inviolable, save only in the event of it proving unfruitful in male children, but I am disposed to believe that in practice Brahmins often take a second wife when they have grown tired of the first, and that in doing this, as in doing so many other things, they consult their inclinations rather than the *Śāstras*. Faria y Sousa states plainly<sup>1</sup> that the Brahmins 'may have as many wives as they can maintain, though they be not of their race.'

Abraham Roger gives some further information about marriage. He says two brothers may not marry two sisters, though a man may marry two sisters or even three at the same time. One may marry his father's sister's, but not brother's, daughter, and his own sister's, but not brother's, daughter. Śūdras, however, were permitted to marry their brothers' daughters, and the Governor of *Paliacotta* did so to Abraham Roger's knowledge. With this may be compared what Marco Polo declared to be the case, namely, that 'they' (the people of South India) 'look not on any sin of the flesh as a sin. They marry their cousins german, and a man takes his brother's wife after the brother's death; and all the people of India have this custom.' But, he says,<sup>2</sup> the king of Malabar, though he had 500 wives of his own, forcibly took his brother's wife away

<sup>1</sup> Translation, by Stevens, of 1695, vol. ii. p. 405.

<sup>2</sup> Yule's *Marco Polo*, ii. 276.

from her husband, and himself married her, for her good looks. On the other hand, the queen of *Mutfli*, being a widow, would not marry again, 'for the great love she bore her dead husband.'

It is universally believed by English lawyers that, when a Hindû is so unfortunate as to fail to get a son, or loses his only son, it is incumbent on him to discharge his debt to his forefathers and rescue his soul from Hell by solemnly and religiously adopting a boy. I doubt, however, whether this belief is (or ever has been) shared, or acted upon, by natives of any class in South India. I am inclined to think that in South India adoption is practised without reference to any religious idea,<sup>1</sup> and is merely a rudimentary form of will, its principal, if not sole, object being to provide for the future preservation and management of the family property. It is possible, of course, that when a Brahman resolves to adopt, he may be influenced in part by considerations touching his debt to his forefathers and other matters; but I suspect that in the great majority of cases it is not so. I have already shown what Father Bouchet knew about adoption, and that the adoption of females was practised in Dubois' time.<sup>2</sup> I will now go on to cite a very noteworthy instance of an educated modern Brahman, who must be presumed to have been thoroughly well acquainted with English views of Hindû law, deliberately adopting a girl as his daughter and sole heiress. The life of *Vennelacunt*

<sup>1</sup> See note 4, p. 122, above, and p. 128.

<sup>2</sup> I am told it is very commonly practised now.



*Soob Row*, as written by himself,<sup>1</sup> shows how, in 1826, that individual being then forty years of age and his wife being but twenty, were 'so fond of even adopting a child, whether a male or female, that they were obliged to look for one among any of their relations.' He found a poor relative who had two daughters, aged the one three years and the other five months, and gave him the sum of one hundred rupees for the latter.<sup>2</sup> The adopter and his wife named the child, looked upon it as their own, and thought to give it in marriage to the wife's brother, and make it 'as their heir to the whole of their property both real and personal,'<sup>3</sup> provided they should have no child of their own, which they strongly hoped to. The man who so acted was a well-educated and intelligent official, who rose to be Translator and Interpreter to the Sadr Court on a very handsome salary; and instead of providing for the succession to his estate by making a will, or adopting a boy, he adopted a girl and gave her in marriage to his wife's brother. There is no reason to doubt the authenticity and good faith of the interesting autobiography from which this incident has been taken, or to suppose that the adopter was conscious of acting in a strange and unwarrantable manner in adopting the child as his heiress. Looking, therefore, to this case, and judging from what natives have told me, I see excellent

<sup>1</sup> Madras, 1873, pp. 83, 84.

<sup>2</sup> Excellent authority for the act may be found in the *Dattakamī-mānsā*, Sec. vii., 16 and 32. And see note 2 to p. 125, above.

<sup>3</sup> See the statements about adoption in the early part of this chapter, and the notes thereto.

reason for believing that a Brahman may adopt almost any child of his own caste,<sup>1</sup> whether male or female, and that a Brahman woman may adopt a boy or a girl to succeed to her own property.<sup>2</sup> As in marriage so in adoption, in South India one may do much as one pleases.

The death of a member of a 'joint family' probably does not necessarily disturb the relations of the survivors *inter se* as owners of property. I venture to suggest this opinion provisionally, the 'doctrine of survivorship'<sup>3</sup> and many other applauded doctrines notwithstanding. But when a 'divided' owner of property dies, leaving perhaps a widow, infant children, and various more or less closely connected relatives, great difficulty may be occasioned by the fact. A very common solution of this difficulty is found in a couple of the women of the house going shares. Thus the widow and the mother of the deceased will often jointly continue the management of the estate for a time, and after quarrelling over it

<sup>1</sup> One of the fifteen false principles denounced in my *View of the Hindú Law* was that (in South India) 'one with whose mother the adopter could not legally have married, must not be adopted.' Since the publication of my *View*, Burnell's *Index to Tanjore MSS.*, at p. 180, gives excellent authority for the proposition that in South India a Brahman may, if occasion require it, adopt a daughter's or sister's son, and the adoption will be legal. Both the *Dvaitanirṇaya* and the *Dattanirṇaya* teach this. And see the note at p. 185, below. Mayne discusses the subject of adoption very satisfactorily in his fifth chapter.

<sup>2</sup> See Sutherland's *Synopsis*, note v., as to widows adopting *Kṛtrima* sons in Mithilâ.

<sup>3</sup> As to this, see Goldstücker's *Paper on the Hindú Law*, pp. 19 *et seq.*; and Burnell, *Vyavahāra Nirṇaya*, Preface, vii. The modern doctrine seems to be entirely opposed to the Hindú idea, and calculated to subvert the written law as to succession in undivided families.

each will take half. Nothing, perhaps, is commoner than this arrangement, and I should not be surprised to learn that one of the universally prevalent usages, amongst both Brahmans and non-Brahmans, is for the mother and the widow (or widows) to go shares where the deceased has lived apart from his kinsmen. In such case, I imagine, the rights or claims of young children are never so much as thought of: but the widow succeeds because she was wife, and not at all in the capacity of mother and guardian of infant heirs, whilst the mother succeeds as such,<sup>1</sup> mother and son being reciprocally heirs to one another.

Dubois has remarked (at p. 186) that 'the right of succession and that of performing the obsequies are inseparable,' and if we substitute duty for right in respect to the obsequies, no doubt the remark is perfectly just.<sup>2</sup> Probably the idea that he who takes the estate must suitably dispose of the body, prevails in most parts of the world. But when one hears the rubbish gravely talked about the right to perform the funeral and other ceremonies being 'the key to the whole law of inheritance,'<sup>3</sup> and about the three

<sup>1</sup> Manu (ix. 217) says the mother is heir to the son dying childless.

<sup>2</sup> Goldstücker, in his *Paper on Hindü Law*, p. 13, says: 'It has never been denied that a clear duty to perform the Śrāddha implies a right to succeed.' And at p. 21 he observes that a kind of spiritual bargain is at the bottom of the great principle on which the law of inheritance is based. The *Śrāddha* entails expense; the assets supply the means of meeting it.

<sup>3</sup> Mayne rejoices, in the preface to his second edition, that it has recently been laid down in the Bombay case of *Lallubhai v. Mankoover Bhai* (2 Bom. L. R., 388), the judgment in which has been affirmed by the Privy Council, that, except in Bengal, the law of succession is based not upon any theory of spiritual benefits, but upon the simple principle of consanguinity. This is an immense step gained.

balls, and the wipings of rice from the fingers, and all the rest of it, one feels bound to protest in the name of common sense, and to beg one's instructors to be silent about what neither they nor any person should pretend in the least to understand. The ceremony of presenting the *pinḍa*<sup>1</sup> or lump of rice to the spirits of ancestors, I believe, is purely Brahmanic, and never performed by non-Brahman castes. And Brahmans of different castes, *e.g.* *Āyyans* and *Āyyangārs*, appear to perform it in quite different modes and possibly with quite different objects in view. That any of them ever dreams of connecting the superior efficacy of the giver of oblations with the superior right of one to succeed to the estate of a deceased owner, cannot for one moment be believed. The conceit of 'the Hell called *Put*' surely is unknown in South India.<sup>2</sup>

Besides adoption, various contrivances for the disposal of property appear to have been devised by the inhabitants of the Madras Province. For example, there is the *Illata* custom, which I have already described at p. 119. It is supposed at present that this custom is confined to a few castes, principally the *Reddis* of Telugu countries, but by inquiry we may likely learn that the Brahmans, as well as most

<sup>1</sup> 'The old lawgivers divided heirs into three categories, the first being that of the *Sapinḍas*, or kindred connected by the *Pinḍa*, or the funeral cake offered at the *Śrāddha*, and extending to the seventh degree (including the survivor) in the ascending and descending male line.'—Goldstücker, *Paper on Hindū Law*, p. 23.

<sup>2</sup> I am glad to see that Mayne is much of the same opinion. Confer his remarks in §§ 10 and 93.

other castes, follow it to a considerable extent, though they may not call it by the above name.<sup>1</sup> Another rudimentary form of will is the act of an aged person handing over his whole property to one younger than himself, in consideration of that other supporting and cherishing the donor and his dependants so long as they may live. We are reminded here of the primitive Roman *testamentum per æs et libram*. Yet another form is the practice of giving the daughter of the house in marriage to an inanimate object,<sup>2</sup> e.g. part of the house, in order to prevent

<sup>1</sup> Dubois says (at p. 184) that 'a father and mother, unable to support the expense of the ceremonies, give up their son to a man who has girls only. He accepts of him, and gives him one of his daughters for a wife. By this process he is considered as adopted into the family, and enters accordingly into all the privileges and obligations.' In Sumatra, whither the custom may have been carried by immigrants from South India, there was formerly (and may be now) a kind of marriage called the *Ambel-anat*, in which the woman's father bought a young man for her, and took him into his house, and permanently kept him there 'in a state between that of a son and a debtor.' Marsden, *Sumatra*, p. 262. And in Ceylon, by the *Beena* marriage 'the man transferred himself to the hut of the woman.' Lubbock, *Origin of Civilisation*, 63.

<sup>2</sup> See note to p. 152, below. I am informed that amongst the Brahmans of South India it is customary, when the elder brother remains unmarried, and the younger brother marries, for the former to go through the ceremony of marriage with the bough of a tree. In such case all the usual ceremonies, except the *saptapadi*, are performed. The elder brother having done this, the younger can marry without sin. An authority for this (I am told) is the *Vaitinātha Dikshitayam*. This symbolic marriage is said to be performed also before a man marries for the third time, a thing that properly ought not to be done. The following excerpt from a North Indian newspaper is curious: 'A sect called the *Kadava Kanbi* marry their children when their goddess fixes a day, that is, they have no regular marriage festivals every year just as other people have; but at an interval of every twelve years, and only on one and the same fixed day, they celebrate their children's marriage. The period of twelve years being long, they do not fail to marry their children when they get the opportunity. They do not care if either the intended bride or the bridegroom

her passing by marriage into another house or family, and taking the family wealth with her.

One of the most important usages of Brahmans is the *upanayana* or solemn investiture of youths with a peculiar thread or cord worn over the left shoulder, 'by which they are considered as regenerated and admitted to all the privileges of their original birth.' Confer Wilson's *Glossary*. I do not know whether this sacred thread is a mere survival of the original ceremony proper to regeneration. But what is its true significance may be a matter of some importance. There seems to be some ground for supposing that after the Brahmans had begun to intermarry with daughters of the people, and begotten dark-skinned sons, whom they very naturally desired to rear up and educate as true Brahmans, the use of the sacred cord was resorted to for the purpose of distinguishing the new *Dvijās* (or twice born) from the general coloured population. The secondary signification of the term *upanayana* appears to be initiation,<sup>1</sup> that is, of a boy of one of the first three classes into the mysteries of his faith; and to this the putting on of the thread should be quite subordinate, whereas in these degenerate days the teaching of the Brahman is nothing, the giving him his thread everything. A few of the non-Brahman castes in South India, as in other parts of the continent, wear the thread, and it

be an hour old. In case of the want of a wife or a husband, the child is married to a bunch of flowers.'

<sup>1</sup> Aparārka, in his commentary on Yājñavalkya, defines it as the connecting of the pupil with the *gāyatrī* by the *Āchārya*. V. N. Mandlik, *Hindū Law*, 161, note 11.

would be interesting to know why they have adopted the practice, whether in mere imitation of the Brahmans, or because they claim to belong to the second and third classes. The goldsmiths and other artisans, as we have seen, appear to ignore Brahmanic claims altogether ; whether weavers and other thread-wearing castes do so likewise, I know not.

According to Abraham Roger, the *Komatis* and *Chetti Vyâpâris* are *Vaiśyas*, and live after the manner of the Brahmans, whilst the *Vellâlans*, *Kavareis*, *Vadugans* (or Telugu *Bergas*), and other Śūdra tribes are the common people, and pretend to surpass each the other in dignity and importance. I believe that some of the merchant castes of South India still profess to live like Brahmans, and their manners and customs would seem to need to be investigated.

With the exception of these few merchant castes, and perhaps a few *Vellâla* and other families, the great bulk of the non-Brahman population undoubtedly does not live after the manner of the Brahmans, that is to say, of the Brahmans as described in Sanskrit books. But then, as has already been observed, the Brahman as he ought to be, and the Brahman as he is, are two very different persons. What perhaps principally marks the non-Brahman castes of South India is the looseness of the marriage tie, and the universal frequency of concubinage. A consequence of this state of things is that subjects of property everywhere and every day are passing into the hands of persons whom the law courts are slow to recognise

as being possessed of any right over what they may succeed to and enjoy, and who, if they sue as heirs, can hardly recover ; persons such as illegitimate sons, concubines, and others. Now, it is a question, and to my mind a very important question, whether, according to the customs of the people of South India, illegitimate sons and concubines may not in certain circumstances have rights of succession quite equal to those ordinarily enjoyed by legitimate sons and lawfully wedded wives. For example, suppose a man dies, and his father then cohabits with the widow. In such case, according to the doctrine of the Madras High Court, any sons that may be begotten on the body of the widow will be the offspring of an incestuous intercourse, and therefore disentitled to inherit. But I venture to think that in many castes such intercourse, far from being regarded with aversion as incestuous, may be customary and moral, being supposed both to tend to preserve the widow from unchastity outside the caste or family, and to give the father an opportunity of replacing his lost son and enlarging the family. English lawyers may smile at this as extravagant and absurd : but the question is what Indians, not what Englishmen, think of these matters. We may bind the people by new laws, if we will ; but at present we are pretending carefully to maintain the existing laws and customs of the country, good, bad, or indifferent.

It is stated at p. 33 of M. Laude's *Manuel du droit indou*, that the question of the validity of the



marriage of widows<sup>1</sup> has not presented itself in the French territories, but such marriage is forbidden in the Brahman and twenty other castes, including the *Rājahs*, *Vellajas* (? *Vellâlans*), *Komañis*, *Chettis*, *Kavareis*, and even such low castes as the *Vannias* and *Arriapatnoulkâras*. This is very hard to believe. Abraham Roger has mentioned that the *Kavareis* were a very great family because they admitted into their ranks all who belonged to no other family, and, if this is true, one fails to understand how they can be so particular about their widows. The French Courts appear to recognise the levirate custom, supposed by us to have long since died out,<sup>2</sup> of taking to wife the deceased brother's widow.

Perhaps the most noticeable thing in the manual last referred to is the description of the *community* or legal association of kinsmen, living together under the administration of the eldest, or of the most capable, member. M. Laude says: 'This is the normal state of Hindoo families. The community begins usually amongst brothers, upon the death of the common father. . . . It may comprise many families, all linked together by agnatic kinsmanship: when one of the members dies, his succession, at least if he has no particular goods, properly speaking, is not opened; the rights which he had over the common goods do not devolve upon his heirs; his

<sup>1</sup> Marco Polo (ii. 295) says the Queen of Mutili (? *Macchili-patam*) did not marry again 'for the great love she bore' towards her dead husband.

<sup>2</sup> It had not died out in Marco Polo's time. See Yule's *M. P.*, ii. 313.

male children take his place, but all the goods remain in the community : *una domus, communia omnia.*' This description is followed by a monograph on the duties and privileges of the chief who administers the group of families, which, though ably and clearly written, appears to me to be grounded on theories and surmises rather than on ascertained facts. Indeed, like the greater part of the work, this portion manifestly is extracted from Macnaghten, Strange, Grady, and the rest. The author observes, by the way, that the 'Consultative Committee' had declared in 1841, in opposition to all authors of repute, that 'the "community" was not the common right of Hindûs.' This is remarkable, considering the time of the delivery of the opinion, and I should be very glad to have the whole report of that Committee before me. I have always disbelieved in the existence of the village community as a common institution in South India,<sup>1</sup> and I regard the 'community' or aggregate of families system as a thing not yet proved to exist there. If it does not, certainly the interests of civilisation do not seem to call for its creation and advancement by hasty and ill-considered judicial decisions.<sup>2</sup>

I will conclude this desultory Chapter with a description from Faria y Sousa<sup>3</sup> of a most curious custom, which would seem to have had its origin in

<sup>1</sup> Where it occurs, doubtless it will be found to be an exotic planted by a Brahman colony.

<sup>2</sup> Mayne has speculated at large upon these matters in his seventh chapter. He seems to assume upon insufficient grounds that the Joint Family is an extension of the Patriarchal Family. See p. 159, below.

<sup>3</sup> Translation by Stevens of 1695, ii. p. 407.

the primitive idea that every woman belongs not to an individual but to her whole tribe, and is under an obligation to increase and multiply for its benefit. 'If any dies a maid, they cause some poor man of the family (an unheard of beastliness) to deflower her, though very young. Him they pay well for so doing, and, as soon as done, throw stones at him till he runs out of reach.' These last words remind one of weddings in which the fiction of a forcible abduction is kept up.<sup>1</sup>

<sup>1</sup> There would seem to be in India a deeply rooted idea that marriage, of some sort, is essentially necessary for every human being. See note 2, p. 146, above; and p. 188, below.

## CHAPTER VII.

*The Mahomedans of South India follow general customs—The Moplahs—Labis—Revision of law of status—The general law of Mahomedans—Laws common to all inhabitants of South India—Doubt as to the prevalence of the Village System in South India—The Patriarchal Family—Sanskrit ideas foreign to the people—No courts of justice in Indian countries—No laws, but traditional maxims—The Madras Council used to hand over offenders to the Heads of Castes—Dharm—Lex talionis—The circle round the debtor—Bringing sin on one's enemy—Chiefs, Heads of Castes, Gurus.*

WE have now reached—(11) *To what extent do the Mahomedans of the Madras Province follow the usages and customs of other non-Brahman castes, for example, the custom of living together in undivided families, in a state of coparcenary?*

It is commonly assumed by Englishmen, even by officials of twenty and thirty years' experience, that as a matter of course every professing Mahomedan governs himself as far as he can by what is styled the Mahomedan law, and that very similar rules relating to succession, inheritance, and the like, prevail in Stamboul, Bokhara, and Madras. The assumption, however, would seem to be unwarrantable, and in some cases may lead to the unintentional perpetration of grave injustice. As an illustration of this I may describe a 'scene in Court' that took place many years back in the Madras High Court, and very undeservedly raised a great laugh at

the expense of a nervous barrister who had recently begun to practise. A special appeal was called up, and Mr. X began to explain that the appellant and his brothers and others 'were living together as an undivided family,' when one of the Judges roared out—'Stop, Mr. X : please to look at the names of the parties, will you ?' Mr. X obeyed, in fear and trembling. Then quoth the Judge : 'They are Mahomedans, are they not ? Now, pray, can Mahomedans have anything to do with division and non-division and the rest of it ?' Mr. X sat down, overwhelmed with confusion, and forthwith 'appeal dismissed with costs.' All joined in the laugh against the discomfited youngster, and every one was highly diverted with the Judge's fun, except perhaps the special appellant. But now, knowing somewhat more than I did about the ways of the country, I make no doubt that in that particular instance Mr. X was properly instructed, and had a fairly good case to argue, and that the specially learned Judge who put him to shame was altogether in the wrong. For, that many professing Mahomedans in South India habitually follow the general customs of the community in the midst of which they may happen to reside, no one accustomed to Mofussil practice will venture to deny. What is doubtful is, whether the majority, perhaps even a very great majority, of the Mahomedans of the Madras Province do not follow such customs. Most of them, no doubt, are the descendants of unwillingly circumcised Indians, and it would be strange indeed

if they were orthodox in religion and law. And then where are the teachers to teach this rude folk ?

According to Day's *Land of the Permals*, p. 367, the chief of the *Moplahs* is the *Bibi* of Cannanore, and in her family 'of course succession goes through the female line.' The same rule, I believe, is followed by all the *Moplahs* of the Western Coast, and it would be profitable to know whether any of those of the Eastern Coast, generally styled '*Labis*' (Arabis ?), do likewise.

In the Panjâb, as is shown by Boulnois and Rattigan's *Customary Law*, p. 5, many Mahomedans 'subscribe to laws of property, forming part of the village system, which are not known to the *Shera*.' Nor is this surprising when we are told by the same writers (at p. 93) that Mahomedans not unfrequently marry Rajput women. In the case of *Suddertonissa v. Majada Kahtoon*, reported at III. Cal. H. C. R., 694, it was laid down that a Mahomedan family may adopt Hindû customs, subject to any modification which the members may consider to be desirable; and that a judge is not bound to apply to such a family, living in a state of union, all the rules and presumptions which apply to a joint Hindû family. This very reasonable and proper view of the law doubtless would commend itself to the Indian Law Commissioners of 1879, who in their report, after remarking on the frequent changes of religion that occur in parts of India, observe: 'In the confusion of classes and the corruption of creeds, of which some provinces present such strange examples, it may

eventually be found expedient to place the law of status as to property and as to succession on a footing wholly unconnected with religious belief or profession wheresoever the two are not indissolubly united.' I sincerely hope this may be true prevision. At all events we may take it as an earnest of good things to come.

But one cannot forget how excessively difficult it is to root out our old beliefs and superstitions : and the prevailing ignorance about the condition and status of the people of India is forcibly exemplified by the language of the judges in *Jowala Buksh v. Dharum Singh*, 10 M. I. A., 511. There, the parties being Mahomedan descendants of a Hindû converted generations before to Mahomedanism, their Lordships observed : 'Whether it is competent for a family converted from the Hindoo to the Mahomedan faith to retain for several generations Hindoo usages and customs, and by virtue of that retention to set up for itself a special and customary law of inheritance, is a question which, so far as their Lordships are aware, has never been decided.' Fortunately their Lordships upon consideration abstained from straight-way deciding this great question in the negative. But they could not abstain from recording the following *obiter dictum* : 'To control the general law, if, indeed, the Mahomedan law admits of such control, much stronger proof of special usage would be required than has been given in this case.' And, in my humble opinion, this is simply begging the whole question. For, if the 'general law' of the Mahome-

dans of India (if there is such a thing) makes it necessary that every person who professes the Mahomedan faith shall habitually guide himself in civil matters by the rules contained (or supposed to be contained) in certain Mahomedan books, manifestly the existence of a special usage set up in opposition to that law would need to be established by clear and weighty evidence. But in cases of the kind under notice the very first question to be resolved will be, what is the general law ? Do the Mahomedans of India, as a body, follow a certain aggregate of laws, known in English courts as the Mahomedan ? Or do they follow various laws, usages, and customs in various localities, and for various castes ?<sup>1</sup> For myself, as at present advised, I am inclined to think that there is no law (properly so called) common to all the Mahomedans of India, and that in fact the Mahomedans of cities like Delhi and Agra, and the Mahomedans of the Panjâb, habitually guide themselves by very different sets of rules ; whilst the Moplahs of the Western Coast and the Mahomedans of the Ceded Districts have quite other usages and customs of their own, peculiar not so much to them personally as to the local areas in which they may happen to reside.

It may seem to some to be no great matter whether the Mahomedans of South India in fact do or do not follow the usages and customs of other non-

<sup>1</sup> Burnell has stated in his *Dâyadaçaçloki*, see note 3, p. 4, that 'the Khojas and Borahs (who are descendants of Hindûs converted to Muhammadanism some centuries ago in Gujarat) still follow with pertinacity the Hindû law.'



Brahman castes, and therefore it may be well to explain my reason for suggesting the eleventh topic of inquiry. It is simply this. I see reason to believe that these Mahomedans may follow a few only of such usages and customs, and, if only we could ascertain with precision what those few are, a great point might be gained, inasmuch as those few probably would be found to be some of the usages and customs common to the majority of our non-Brahman castes, of the characteristic phenomena of conduct that distinguish the Indian from other groups of men.

Although in this topic I have mentioned Mahomedans alone, the inquiry that I recommend would properly be extended to other sections of the population which appear to be in a similar plight or condition, for example the Jains, Christians, and Black Jews of South India. If it were discovered that, whilst each of those bodies has laws peculiar to itself, all agree in observing a few laws common to the majority of the inhabitants of South India, it might be considered to be almost certain that those few laws are purely Indian, the product of natural evolution in special circumstances.

Where Boulnois and Rattigan speak of custom as opposed to law in the Panjâb, they generally may be understood to mean by it the Village System, which appears to vary considerably in different parts of the country, though its general tendency is said everywhere to be to favour the institution of the Joint Family, and check the acquisition of individual

rights. I do not think it is so in South India. Possibly the fundamental concept of society and civilisation may be in South India too the Patriarchal Family, which, according to Maine, is 'a group of men and women, children and slaves, of animate and inanimate property, all connected together by subjection to the Paternal Power of the chief of the household.' But, unless I am greatly mistaken, the Village Community is a foreign idea all over the Peninsula, and the *Āryan* Village (if it occurs at all)<sup>1</sup> is to be found only here and there, in a few specially eligible spots in the vicinity of rivers. The system generally prevalent in South India, if it can be called a system, would seem to be (or rather to have been) the tribal, with all rights vested in a quasi-military aristocracy.

I have said that the idea of the Patriarchal Family may underlie the great body of the institutions observable in South India, but certainly the matter needs investigation, and it would be quite unsafe to assume the presence of any such underlying idea.<sup>2</sup>

<sup>1</sup> Maine appears to have been misinformed upon this point. He states (in § 198) that 'the village landholders are represented in South India by a class known as *Mirāṣidārs*.' This is quite erroneous. The Arabic word *Mirāṣi* denotes hereditary enjoyment, and no more. It is quite foreign to the *Drāviḍa* peoples, and connotes no idea connected with the village community. Wherever the word is used, except near the town of Madras, *Mirāṣidār* commonly means holder of a village office.

<sup>2</sup> The speculations of Maine, Lubbock, McLennan, Spencer, and others upon these matters are very entertaining, but by no means conclusive. It would be quite as easy, in my humble opinion, to account for the habits of other kinds of animals as for those of our earliest progenitors. Possibly man has only imitated the beasts around him. The lion may have suggested the strict Patriarchal Family, the elephant the Joint

It may be quite true that Tamils and Telugus love to live as members of large aggregated families, united together by the blood-tie through a common male ancestor, and by a voluntary subjection to the managing member ; and yet it may be not true that anything of the nature of Paternal Power keeps the units of any of these families together, and controls their individual desires and wills.<sup>1</sup> The Sanskrit ideas of union, division, separation, partition, reunion, adoption, and the like, not only are foreign, they are (I verily believe) not communicable by vulgar words, to a man of an ordinary non-Brahman caste. Not only is such a one ignorant of such things, because he never does the acts connoted by these phrases : his mother-tongue is too poor, and at the same time too precise and rigid, to admit of the meaning of these phrases being conveyed to him by a roundabout method of speech. He can understand a number of descendants from a common ancestor living together in one 'house,' but the incidents attached to the plight of the '*Avibhakta*' (unseparated one) are beyond his comprehension. He knows what it is to 'take' a child ; but the adoption of a son as a performance of religious duty is altogether beyond the range of his speculation.

What then are the usages and customs of non-Brahman castes that the Mahomedans and others can

Family, the goat polygamy, the dog polyandry, the monkey the tribal system, and so forth. At first, no doubt, the rule was unrestricted (as opposed to restricted) polyandry.

<sup>1</sup> See p. 125, above, as to management by females.

retain? I am most anxious to learn. They must, I suppose, be few in number, and of the simplest nature. Whatever they may be, I am satisfied that they cannot be complex and principal rules of conduct, derived ultimately from Brahmanic treatises on law. Between the Brahman and the non-Brahman of South India a great gulf has been set.

The last of our topics has been reached, namely—  
 (12) *What was the nature of the authority exercised by Gurus, Heads of Castes, Heads of Villages, and caste-meetings, respectively, in settling disputes of a civil nature, and punishing crimes and transgressions, before the establishment of the British power? And what portion, if any, of the authority of any of them survives?*

Maine observes<sup>1</sup>: 'Though the Brahmanical written law assumes the existence of king and judge, yet at the present moment in some of the best governed semi-independent Native States there are no institutions corresponding to our Courts of Justice.' But, he goes on to say, civil disputes are settled by the elders of the village community, whilst criminal justice is administered by soldiers. What is here said of Native States of the present day is true, I am persuaded, for India generally, and at all times of her history. I am not prepared to deny that occasionally a Rajah, for his amusement and pleasure, may have set up something resembling a court of justice in a great city like Delhi or Benares or Malwa; or that parts of the *Code of Menu* may, as Maine puts it,

<sup>1</sup> At *Village Communities*, p. 71.

‘enshrine many genuine observances of the Hindoo race.’ But I am firmly persuaded that the normal condition of India has ever been to be without what Europeans understand by laws and law-courts, and that Heads of Castes, *Gurus* and others, have administered, in a very imperfect and unsatisfactory manner, what little justice has been obtainable in the country.

The evidence upon this point is abundant and good, both positive and negative. I have already set out some of the latter ; I will now go on to indicate some of the works in which evidence of the former kind can be found. Orme<sup>1</sup> has observed : ‘Intelligent inquirers assert that there are no written laws amongst the Indians, but that a few maxims transmitted by tradition supply the place of such a code in the discussion of civil causes, and that the ancient practice, corrected on particular occasions by the good sense of the Judge, decides absolutely in criminal ones.’ Then Dubois says (at p. 13) : ‘In India, where the Princes live in extreme indolence, and take little pains to make their people happy by the reign of justice and good morals, there are no other means of attaining this end and of preserving good order but by the authority and customs of the castes.’ Father Bouchet, in the very valuable letter cited above, has distinctly stated that when he knew South India (in the early part of the last century) the Indians had no code or digest, nor did they refer to the Vedas or other sacred books<sup>2</sup> for information touch-

<sup>1</sup> At p. 25 of his *History, Military Transactions*.

<sup>2</sup> He gives ‘*Vienachuram*’ as the name of one of these. At the first blush this looks like a mis-spelling of *Vijñāneśvarīyam* (the *Mitāxarā*),

ing their laws and customs. They had a few simple maxims, handed down from father to son, and with which all were well acquainted, and all ordinary disputes were settled in accordance with them, generally by family councils.<sup>1</sup> Specimens of those maxims are given, to which I have already called attention. It appears from De Renneville's *Voyages*<sup>2</sup> that P. Van den Broeck lived on the Coromandel Coast for some six years in the first quarter of the seventeenth century, and observed the ways of the Indians, but 'was unable to discover that they had any written law, or any tribunal for criminal affairs, though sometimes, when they surprised some robbers, they would impale them, or cut off their heads, and stick them on the ends of poles.' Faria y Sousa, writing in the same century about the people of India generally, says that the sins they think the most heinous are murder, theft, drinking wine, and adultery. 'The sin of murder is wiped off with pilgrimages; the sin of theft with alms; the sin of drinking with fasting; and the sin of adultery with sacrifices.'<sup>3</sup> Sometimes

but I am disposed rather to connect it with Vijñeśa (Ganeśa), the special god of the Śūdras. It may stand for the *Vijñeśvara-kalpam*, a great authority (I am told) in South India on the worship of Vijñeśa.

<sup>1</sup> See note 2, p. 124, above. P. Sami Iyer, in his *Introduction to True Hindū Law* (Madras, 1877), states that 'the whole system of law in its minutest details is very familiarly expressed in domestic maxims, readily found in the mouths of many members of society, male and female,' and gives three specimens of such maxims in Sanskrit. Part of one of them is the proverb quoted in note 1, p. 123, above.

<sup>2</sup> Vol. vii. pp. 497-8, Ed. 1725.

<sup>3</sup> The *Mānavadharmasāstra* (ix. 240) expressly provides that an offender who performs the prescribed *prāyaścitta* (expiation) shall be only fined. And in later times enormous treatises on *prāyaścitta*, e.g.

men are sacrificed, but the greatest of all is the sacrifice of cows.' This writer tells us nothing about laws and law-courts ; and if a murder could be ' wiped off with a pilgrimage,' we may be pretty sure there were no Small Cause Courts in the country in his time.

That there were no criminal tribunals, and no regular administration of justice, in the neighbourhood of Fort St. George, for a long time after the British Government was established there, appears unmistakably from Talboys Wheeler's *Madras in the Olden Time*. At p. 345, vol. ii. of that entertaining work, it is stated that the case of the seduction of a certain Rajpoot woman was considered at very great length by the Council, and eventually ' handed over to the arbitration of the heads of the castes,' who mulcted the offender in the sum of 400 Pagodas. Whether the sentence was ever executed does not appear. At p. 380 of the same we learn that a ruffianly criminal who was sentenced to the pillory, and to have his ears slit, was saved by the intercession of the heads of the Left-Hand caste, and his punishment commuted to a fine. At p. 399 is given an account of a man being sentenced by the Governor for perjury to the pillory, thirty-nine lashes on the first day of each month for six months, and perpetual banishment.

Hemâdris, were compiled without the slightest allusion to punishment by the State. The Hindû mind appears to regard what Europeans call crimes or offences merely as sins, or acts productive of evil consequences to the doer, and almost entirely to overlook the consequences of acts to the persons directly injured by them, and to the State generally. See Burnell's introduction to the *Sāmavidhānabrāhmaṇa*.

At Vol. ii., pp. 739 *et seq.*, *Supplementary Volumes*, Sir W. Jones' works, are to be found some curious examples of the mode in which justice was administered in the neighbourhood of Benares towards the end of the last century, at the very time when Colebrooke thought the country was full of lawyers who rarely dissented from the authority of the Mitâxarâ. The recognised mode of compelling a debtor to pay up appears to have been by sending a Brahman to do *dharnâ* (is this our 'dun' ?) before his house, with a dagger or a bowl of poison, to be used by the Brahman on his own body if the debtor proved obstinate. When the tax-collector gave too much trouble, a ryot would sometimes erect a *koor*, or pile of wood, and burn an old woman on it, by way of bringing sin on the head of his tormentor. The *lex talionis* obtained in the following shape. Persons who considered themselves aggrieved by acts of their enemies, would kill their own wives and children, in order, as we may suppose, to compel their enemies to do a similar act to their own hurt. Thus two Brahmans cut off their mother's head to spite a foe. And it seems that upon being punished by loss of caste, out of deference to the feelings of the British Government, these simple-minded men expressed the greatest surprise, since they had acted, so they said, through ignorance. On one occasion five women were put to death together for witchcraft, after being regularly tried for the offence, according to custom, by the heads of their caste.

With regard to the *lex talionis*, a letter is preserved



in Recueil X of the *Lettres cur. et éd.*, written by Father Martin in 1709, in which he describes the horrible practice in vogue amongst the inhabitants of the Marava country, of killing or wounding one-self, or one's wife or child, in order to compel one's enemy to go and do likewise. Such a practice can obtain only where no legal means exist of obtaining reparation for wrongs suffered. It would be very interesting to know to what extent this natural law has prevailed, in various forms, in South India, and whether its influence has yet altogether died out. The practice of *Dharnâ* would seem to be nothing more than a threat of instantly resorting to the *lex talionis*. And I take it that Marco Polo was mistaken in his view of the meaning of a creditor drawing a circle round his debtor, by way of arresting him, when he said<sup>1</sup> that a debtor who breaks such arrest 'is punished with death as a transgressor against right and justice,' and that he (Marco Polo) had seen the King himself so arrested and compelled to pay a debt. Doubtless the King was coerced by the threat, expressed or implied, that the creditor would kill or wound himself, if not satisfied, in which case the King would have been bound to kill or wound himself in return. Father Bouchet, in the letter cited above, tells us that obstinate debtors were arrested in their houses by their creditors in the name of the Prince, under pain of being declared rebels, and when so arrested durst not pass out until bystanders had interceded and made the creditors come

<sup>1</sup> See Yule's *Marco Polo*, 279.

to terms. The use of the name of the Prince I regard as imaginary, and opposed to native ideas. What coerced the debtor probably was the fear of his creditor injuring himself. And possibly it is this fear that often operates on the minds of native servants of the present day when they decline to go on a long journey with their masters without first partially satisfying their creditors. And where, as so often happens, an old man or woman is killed by his or her own party in a boundary riot, probably in most instances the object of the slayers is to bring sin on their opponents.

When Buchanan journeyed through Mysore and the surrounding districts, he seems to have found almost every petty subdivision of a caste managing all its own affairs, without reference to any higher authority, through a chief or a body of headmen of its own. Thus a certain caste of weavers was ruled by its *Nattamgar* (*Nāttānmeikkāran*) or hereditary chief.<sup>1</sup> The *Panchālas*<sup>2</sup> had a chief of their own, who levied fines from offenders and presented them to Kālī. A chief styled the *Kangyam Manadevar*<sup>3</sup> had settled all disputes arising between *Vellāḷans* in Coimbatore; but on discovering that he excommunicated men unjustly, the Collector had taken away his jurisdiction, and ordered the Tahsildar periodically to hold assemblies of the caste and arrange their differences. Amongst the *Idigaru*<sup>4</sup> the Government renter, assisted by a council, settled all disputes. For-

<sup>1</sup> Vol. ii. p. 265.

<sup>2</sup> Vol. i. 250.

<sup>3</sup> Vol. ii. 329.

<sup>4</sup> Vol. i. 395.

merly, Buchanan tells us,<sup>1</sup> every village was ruled by its hereditary chief, called in Tamil the *Maniyakâran* (Monigar), who was also <sup>2</sup> the hereditary priest of the village goddess, *Bhadra-Kâli*. And from what the Madura missionaries have stated in their reports I believe this to have been generally the case.

Coming to more modern times, we find it stated in Steele's *Hindoo Castes* <sup>3</sup> that the Lingayet castes continued to obey the orders of their *Gurus*, as directed by the late Peishwa ; and that at Poona and Sattara every caste had its own rules, and settled its own affairs, expelling sinners and readmitting penitents. Penance <sup>4</sup> was performed for *Bramha-hatyâ*, which included abusing as well as killing a Brahman, for killing a woman or a child, for eating forbidden food, drinking spirits, incest with a mother, or with the wife of a *Guru*, and other grave crimes. But, as a rule, readmission into the caste could be obtained, after penance, by paying a fine or giving a dinner to the caste. In order to prove innocence, ordeals of various kinds were resorted to.

<sup>1</sup> Vol. ii. 213.

<sup>2</sup> Vol. ii. 216.

<sup>3</sup> At pp. 122 *et seq.*

<sup>4</sup> See note 3, p. 54, above.

## CHAPTER VIII.

*Apathy of Rajahs—Normal state of an Indian country—Independent action of the castes against Christianity in 1851—Administration of justice in the eighteenth century—General and particular customs—Copper plates at Conjeveram—Results arrived at—The lawyers have made no progress: the Sanskritists have made much—Sanskrit books to be classified—Usages to be investigated and compared with the so-called laws—The case of the non-Brahmans—Nothing to be taken for granted—Importance of the question of the ‘Hands’—Injustice of judicially recognising the customs of the Western Coast alone.*

I HAVE essayed to show in the third chapter that, according to the Brahmanic theory, the King should decide disputes arising between men who are not Brahmans, or between bodies of such men, after learning from the lips of the heads of the communities to which the disputants may belong what may be the established customs of such communities; and that the Heads of Castes not only are the depositories of traditional usages and customs, but also ‘have authority to lay down rules for their respective classes.’ I do not suppose, however, for a moment that this theory has in any degree influenced the minds of any of the successive rulers of South India. I prefer to believe with Maine<sup>1</sup> that the Rajahs of India, both great and small, have always refrained from troubling themselves about the manners and

<sup>1</sup> Confer his *Early Hist. Instns.*, 13th Lect.

customs of the unfortunate beings who may have to pay them taxes. And, left entirely to themselves, the several castes naturally would fall under the sway of the most powerful and energetic of their individual members.

Nowhere, perhaps, has the normal state of an Indian kingdom been more felicitously described in a few words than in the following excerpt from a letter written by Father Martinz to the General of the Jesuits in 1651, and preserved in the *Mission du Maduré*, ii. 393 *et seq.* : 'L' idée d'un monarque qui regarde son peuple comme une immense famille dont il est le père n'est jamais entrée dans l'esprit ni dans le cœur des rois indiens ; ils se regardent plutôt comme de grands propriétaires, et leur royaume comme une vaste ferme à exploiter. Pleins d'énergie, de sagacité pour extorquer de leurs sujets le plus d'argent qu'il leur est possible, ils sont aveugles négligents et faibles à l'excès dans tout ce qui regarde le bon ordre, la répression des crimes et des injustices. Tous ces soins sont abandonnés à des subalternes, aux chefs de castes et aux gouverneurs des provinces et des villages ; ceux-ci sont eux-mêmes comme autant de petits despotes ; habiles à se rendre indépendants ou à justifier leur arbitraire par des intrigues et des présents offerts à la cupidité de ceux qui devraient les surveiller.'

Having shown the usual state of things in South India, Father Martinz goes on to state that upon the death of the Governor of *Sattiamangalam*, and the succession of his infant son, the chiefs of the castes

took counsel together as to the best mode of putting down Christianity within their borders, and passed a law expelling from caste all Christians<sup>1</sup> and all who should hold converse with Christians. And there-upon began a general persecution. This is a striking instance of what may be called legislation by the chiefs of the castes acting together, and should not be overlooked by the student. It shows that, at a time when the *Nāyakkān* dynasty was firmly seated in Madura, most important matters were taken in hand by these chiefs, and settled without reference to the Government.

We find from Father Bouchet's letter, which has been so often cited, that affairs of caste were settled by the chiefs of castes, and sometimes by *Gurus* (priests). Disputes between disciples were settled by the latter. The Head of the Village, or of a group of villages, generally decided all suits for the payment of money lent, and in some cases would take ten per centum on the value of the suit as his fee for deciding. Ordinarily the winning party paid all the costs, as being the better able to afford them. This, by the way, is opposed to the rule in *Yājñavalkya*, ii. 42. The *Gurus* took a great deal more in the way of fees than did the Heads of groups of villages. Interest was charged in bonds at one or other of three rates, namely, at 12 or 48 or 24 per centum, which were

<sup>1</sup> I learn from the *Madras Mail* of October 9, 1880, that some excitement had recently been caused in Bengal by the native principal of the Government Sanskrit College ruling that for mere baptism a man cannot be excommunicated from Hindūism according to the *śāstras*.

styled the 'virtue,' 'sin,' and indifferent rate, respectively. As may be imagined, suits were decided without much regard to the interests of justice. And when a creditor got a decision in his favour, it does not appear that the judge, whether a chief of a caste, or a *Guru*, or a Head of a group of villages, had either the will or the power to enforce execution of his award. On the contrary, the practice of the creditor himself arresting the debtor still prevailed, as has already been shown.

With regard to the punishment of crimes, Father Bouchet has recorded some interesting details. Murders were very rare, and hence perhaps it was that so little justice was practised in respect to this crime. As a rule a fine of a hundred crowns satisfied the Prince, even where the murdered man was one of his own officers. Queen Mangammâl had abolished capital punishment, apparently without bringing on any increase of crime. Brahmans were never put to death by violence. But sometimes their eyes were put out, and occasionally they were killed by starvation in a cage lined with thorns. It was permitted to a husband to kill his adulterous wife and her lover at one and the same time, but not at different times. Banishment was a common punishment for grave crimes, but in practice it only meant quitting the city by one gate and re-entering it by another. In cases of theft ordeals were largely resorted to. Of these the commonest was that of boiling oil. And Father Bouchet observes that in numerous instances he had seen the suspected person plunge his arm

into the boiling oil and withdraw it unhurt. Another test of innocence was the attempt to take a ring out of a narrow-necked vessel containing a snake.

Whilst, ordinarily, family disputes were arranged by family councils, and disputes between creditors and debtors were decided (but not terminated) by the Heads of Villages and others, and caste matters were settled by the chiefs of castes, important altercations between competing bodies of men appear to have been settled by the Rajah himself, in council. Thus, as we have seen already, the Rajah settled a grand dispute between the *Bhaktās* and the *Jainas*, and decided that there was no essential difference between their rival religions. And the *Madura Country*, Part III. p. 170, gives instances of the *Nâyakkan* (or Prince) acting as judge in disputes between castes. And here it is to be observed that Father Bouchet was informed that, whilst disputes between individuals were settled always with reference to certain maxims of universal application and familiar to all classes, those between castes were (or were supposed to be) settled in accordance with the particular laws of castes. And these laws were said to have been engraved on copper plates, which were preserved in the great Pagoda at Conjeveram until the Moors sacked the town, after which event they had disappeared. This, obviously, was a mere fable. In Hiouen Thsang's time Conjeveram was a very flourishing city and the capital of the *Drâvida* kingdom, and it is easy to see that the known circumstances of some copper-plate grants of lands and



privileges having been placed for safe custody in one of the Pagodas of Conjeveram might lead some to suppose that memorials of all kinds were there deposited, and amongst them copies of the particular laws of all the castes. That such laws ever existed it is quite impossible to believe.

I have now got through my task of indicating some of the many directions that research must take before even a satisfactory view of the field of Hindû law can be obtained. It only remains for me to sum up the main results that may be taken to have been arrived at, and offer some practical suggestions as to the mode in which Government may profitably interfere in the matter of Hindû law.

My first conclusion, and I may add that in my humble opinion it is the most important, is that, whilst the Sanskritists have covered much ground and made real progress in the course of the last few years, and may reasonably hope to get near their goal in the course of a few more, the lawyers and jurisconsults of India (as a body) cannot be said to have advanced a step in the study of Hindû law. But, on the contrary, by rashly publishing as settled and essential doctrines a number of unwarrantable legal concepts of their own devising, they have done their best finally to stop all progress towards the truth. These may seem to be hard words, but I have no individuals in my thought, and mean no disrespect. Only I feel that the Hindû law is in a sad plight, and can be rescued by plain speaking alone.

I would wish to impress on the minds of my

readers, in the next place, that before anything worth the doing can be done in the way of acquiring knowledge of the Hindû law, everything at present supposed to be known about it must be cast aside as probably false, or at the least be regarded with grave suspicion. For example, all the High Courts and all the writers of manuals, every one in short who has no Sanskrit, declares that 'the normal state of a Hindoo family is one of non-division,' but Burnell and V. N. Mandlik, who have read the law-books in Sanskrit, and know what they are talking about, say it is not so. And, though I do not venture to express an opinion of my own as to what the Hindû theory upon this point may be, I may say that, judging from my experience of the practice of families in South India, in so far as it has come under my observation, I see no reason whatever to suppose that Indians generally live together in a state of 'union' such as that described in speculative Sanskrit treatises on law. No doubt the natural timidity and helplessness of the Indian character, and the special circumstances of the country, have largely operated to keep families together ; but that is altogether a different matter from a supposed universally prevalent system of 'coparcenary,' with its principal incidents, rights, and correlative duties.

Next, I think that it is a matter of prime importance rightly to mark off and classify the Sanskrit works that treat of law properly so called. Whilst some of these may once have been regarded as laws by aggregates of Âryan families, others, it is certain,

were intended to be no more than expositions of speculative views of their authors. Others, again, may have been written for the practical guidance of a few courts of justice set up by exceptionally enlightened Rajahs. And then there are the 'digests' (*nibandhas*), some of which have neither form nor plan, nor authority of any kind whatsoever. It is a common practice with Anglo-Indian lawyers to cite texts indiscriminately from all or any of these works, as if anything written in the Sanskrit tongue were intrinsically valuable ; whereas, in truth, but very little of what Sanskrit legal literature is known to us can have any real force or value of its own, and much may be heretical, or at the least inconsistent with the notions and practices of modern Brahmans.

A classification of the existing Sanskrit law-books having been obtained, the next step will be to ascertain which of them (if any) should be considered to be obligatory on the Brahmans of South India generally, or on particular castes or schools or fellowships of Brahmans, and for what purposes and to what extent. In order to ascertain this it would be necessary to make a thorough investigation of the usages and customs of the modern Brahmans of South India, and compare the results obtained with the usages and customs prescribed, forbidden, or referred to in the law-books. If it were discovered that such Brahmans habitually do many things prescribed by certain books, and also habitually refrain from doing many other things forbidden by the same, it might be safe to decide that those particular books

are of universal obligation on such Brahmans. If, on the other hand, it were discovered (as I imagine it would be) that such Brahmans do not guide themselves by rules contained in any of the law-books, or by rules resembling rules contained in any of the law-books, in such case matters would be greatly simplified : it would only remain to digest the rules actually current, and recognise them by proclamation. If, again, it were discovered that, as some orientalists seem to suppose, such Brahmans still govern themselves in accordance with the rules of their respective *Śākhās* or recensions of the Vedas, it would be necessary to attempt to connect particular law-books with particular *Śākhās* and determine the limits of authority of each. Thus, it might turn out that the *Sāmavedīs* should be bound by the *Gautama-sūtra*, the *Āpastambīyas* by the *Āpastamba*, and so forth. And the *Mitākṣarā* might come to be set aside as heretical and absolutely devoid of authority in South India.

The case of the non-Brahmans is altogether different. Probably the supposition is correct that at the present time no true *Śūdra* castes are to be found in South India, and therefore no non-Brahman castes to whom the Hindū (or rather the Sanskrit) law can properly be administered. But, if any such there be, the question will be, what rules (if any) contained in Brahmanic law-books can be applied to such castes ? The Brahmans have ever treated the *Śūdras* with absolute indifference and contempt, and it is not to be expected that many writers on Hindū law should have troubled themselves to regulate by

precise ordinances the conduct of unregenerate *Śūdras*. On the contrary, several of them appear to have declared that the various *Śūdra* castes should continue to preserve their own customs, and, when necessary, should make laws for themselves. In any case it would seem to be certain that but very few non-Brahman families should be held to be obliged by Brahmanic law, and that those few should have but a very small part of that law administered to them in disputes about matters of succession, inheritance, and the like.

The infinitely various usages and customs of the non-Brahman tribes and castes of the Madras Province need to be thoroughly investigated, and in the most impartial spirit. Nothing connected with them must be taken for granted, nothing passed over as meaningless and unimportant. Above all, care must be taken to discover the special ideas that may underlie the more remarkable of the usages and customs investigated, and if possible to trace the same in other connections. It is a too common practice in this country at once to ascribe to the mysterious influence of religion or caste whatever may be hard to understand in the way of personal conduct, whereas in many instances an act that appears strange and unaccountable to a European is done in obedience to a custom grounded on mere convenience. The importance of correctly appreciating these underlying ideas can hardly be over-estimated, inasmuch as it will sometimes happen that two tribes having quite different ideas have adopted one and the same

custom. In illustration of this proposition I may refer to the levirate, the well-known custom of the husband's brother (or nearest kinsman) taking the widow to wife. If we look to *Deuteronomy* xxv. and the *Book of Ruth*, we shall find that the reason for the custom with the people of Israel was the supposed necessity of keeping alive the name of the deceased. The seed raised was to the deceased not to his kinsman, and hence Onan's unwillingness to complete his act of duty. But in this country, at all events among the non-Brahman castes, no such idea could prevail, inasmuch as the seed would be raised not to an individual but to a 'house' or family.

I believe that it will be found to be necessary to legislate separately for the non-Brahman castes, as being in all essential respects separate and distinct from, and incapable of association with, the Brahman. Before taking action in this direction, it will be essentially necessary to ascertain with precision the nature of the opposition between the two 'Hands,' and of the religious, historic, and other ideas that bind together the constituents of the two divisions. It is hardly an exaggeration to say that until we know all about the 'Hands,' we shall remain absolutely ignorant of the constitution of Indian society, and incapable of understanding its needs. It seems to be tolerably certain that the *Panchâla* (goldsmiths and artisans) not only are not orthodox Hindûs, but from the very earliest times have stood aloof from the general population, and managed their affairs in a strange fashion upon esoteric principles of their own,

derived from sacred writings known only to their own *Gurus*. These principles the *Panchâla* may or may not have communicated to the other castes that go to make up the 'left hand.' Probably they have not. The 'right hand' is generally supposed to consist of strictly orthodox *Śûdras*. As a matter of fact its leading members would seem to be *Linga*-worshippers, who openly deride Brahmanism and the Vedas.

Certain striking peculiarities of the inhabitants of the Western Coast have forced themselves upon the attention of the Madras High Court, and won 'judicial recognition,' with the result that, in modern law-books, the so-called 'Hindoos' of Madras are divided into two classes, namely, into Hindoos proper and Hindoos of the Western Coast. This is all very well so far as it goes, but I would wish to impress on my readers my conviction that many castes exist in South India whose ethic and other ideas are hardly, if at all, less peculiar than are those of the inhabitants of the Western Coast; and that to accord 'judicial recognition' to one set of ideas and withhold it from another, is simply a capricious and unjust exercise of power.

In my next and final Chapter I shall make a humble attempt to show what may be done by Government in the way of preliminary inquiry and provisional legislation towards fulfilling the promise made again and again to the people of South India, that the British courts of justice shall administer to them their own laws in disputes about succession, inheritance, and the like.

## CHAPTER IX.

*The main object of law—The Indian may hardly do anything—Factum valet—An enabling Act needed—Natural right of the Indian to do acts at will—Shifting the burden of proof—Settled principles to be uprooted—The Madras High Court has set its face against usage—Sanskrit books to be reported upon by a commission—District Committees to inquire about customs—Their information to be worked up and published—Apt equivalents for phrases to be avoided—And all terms of art—Particular inquiry as to the ‘house’ or family—Rights over things—Notions of property—Rules to be framed—Customs how to be judicially investigated—Opinions of Heads of Castes and Gurus—Registration to be more largely employed—The Family Council—The Managing Member—Heads of Castes to be officially and judicially recognised—A Code may be drawn up hereafter.*

THE main object of law, rightly considered, is not to restrain men from doing what they may wish to do, but rather to mark out bounds within which they may freely do such acts as may seem good to them without occasioning hurt to others and (indirectly) to themselves. But if one looks at the English treatises on Hindû law, or at the reports of the several High Courts of India, one will at once be struck with astonishment at the number of acts, in themselves indifferent if not actually laudable, that the unfortunate ‘Hindoo’ is strictly forbidden to do. He may not marry this girl, he may not adopt that boy, he may not sell (what seems to be) his own house, he may not cut off a rebellious son with a rupee, he may not provide suitably for his widow—in fact the Indian



has been fettered and manacled till he can scarcely move. And his friends may well ask in despair, Who shall arise and disenthral him ?

Of all the acknowledged principles of the so-called Hindû law '*factum valet*'<sup>1</sup> is the most sound and useful : and my earnest desire is to see that principle very considerably extended, so widely, indeed, that the Indian of the coming generation may feel himself to be a free man, at all events within the domain of civil law. What, then, should be done in the first place to bring about this desirable consummation, without injury to individuals or prejudice to vested interests? My idea, which I have entertained during a long space of time, is that Government should pass a short relieving and enabling Act of the character of that most excellent law, the Widows' Re-marriage Act, 15 of 1856, but of a much wider scope. The desired enactment should recognise and proclaim the general right of the Indian to consult his own inclinations in all matters of marriage, adoption, alienation, testation, and the like. And it should go on expressly to declare that where a party to a suit challenges an act or forbearance as being opposed to the Hindû law, or to some custom of his caste, and therefore wrong and invalid, the burden of demonstrating that it is so shall lie wholly on the chal-

<sup>1</sup> Strange says (at i. 87) that, 'according to the maxim of the civil law, prevailing perhaps in no code more than in that of the Hindoos, *factum valet, quod fieri non debuit*.' And in the judgment in *Hanuman Tewari v. Chirai*, it was stated that 'the High Courts of Calcutta, Madras, and Bombay have all ruled in favour of the doctrine of *factum valet*.' It is a pity they have narrowed its application.

lenger : and in default of clear and positive proof to the contrary, such act or forbearance shall be deemed, as between the parties and for the purposes of the particular suit, to be in all respects right and valid, all rules contained in the *Mitâxarâ* and other books notwithstanding.<sup>1</sup> And, next, the enactment should distinctly forbid the courts to assume in any case that a party to a suit, whether a Brahman or a non-Brahman, is obliged in any degree or for any purpose by the *Mitâxarâ* or any other Sanskrit book, and should direct that where a party denies the applicability to him individually of the so-called Hindû law, or of a particular part thereof, his opponent who affirms the same shall be bound to establish the averment by good and sufficient evidence.

The immediate practical effect of making such a law would be to uproot and sweep away all the 'settled principles'<sup>2</sup> of the so-called Hindû Law, which disfigure the reports of the Madras High

<sup>1</sup> V. N. Mandlik says (*Hindû Law*, p. 425) : 'It rests with those who attack marriage ceremonies publicly performed in accordance with caste usages and with the sanction of the caste people, to make out that such marriages are improper.' He refers specially to the universally prevalent and accepted practice (in South India) of marrying the daughter of one's maternal uncle. And he goes on to show that 'another important usage of the country is for a man to marry his sister's daughter.' At p. 433 he states that as to *Sûdras*, the Hindû law has nothing to do with, the usages of the country alone regulate, their marriage practices.

<sup>2</sup> One of the main evils of judge-made law is the inveterate habit of judges adhering to precedent. The blunder of to-day, bred of ignorance and misconception, becomes the authority of to-morrow. The erroneous conclusion rashly come to after some argument, and reference to a few books, is raised by-and-by to the dignity of a 'settled principle,' to attack which were flat blasphemy. Confer what Mayne says about judicial decisions in § 38.

Court, and of which I am persuaded hardly a single one can bear examination by a competent and unprejudiced critic. Above all, the ancient policy of the British Government would be revindicated in this, that the ancient usages and customs of the people would be set up on a firm basis, and freed for ever from the corroding influence of judge-made law. In the present state of things, whereas the Madras Civil Courts' Act of 1873 expressly declares that 'any custom (if such there be) having the force of law and governing the parties or property concerned shall form the rule of decision,' the Madras High Court has declared, on the contrary, that a custom which has never been '*judicially recognised*' cannot be permitted to prevail against distinct authority. And, consequently, we are pained and scandalised every day by what Holloway, J., has styled the 'grotesque absurdity' of applying (what is called) the Hindû law to the non-Brahman castes of the country. If any one doubts whether the Madras High Court really has set its face against Indian usages and customs, I would refer him to Chapter ii. of my *View of the Hindû Law* and the cases therein cited. There he may find amongst other things that in *Tayumana Reddi v. Perumal Reddi*, although both parties agreed as to the existence of the *Illatâ* custom, which I have described as prevailing alike in the Madras Province and in the Panjâb, and which probably has prevailed for many centuries amongst nearly all the tribes and castes of India, the Madras High Court decided that such custom could not be upheld, 'being at variance

with known and fundamental rules of Hindoo law.' Further than this it was hardly possible for the Madras High Court to go in its opposition to Indian usages and customs, but the case of *Gopalayyan v. Raghupatti Ayyan* was quite as bad. In settling that altercation, the Judges inferred from the dictum of an obscure Sanskrit speculator that a man may not adopt his sister's son, and decided accordingly, in the face of an overwhelming mass of evidence as to custom, and although natural instinct points to the adoption of one's sister's son as being more convenient and proper than that of any other person whatsoever.<sup>1</sup>

After clearing away noisome rubbish in the mode above proposed, Government would do well in appointing a mixed commission of orientalists, judges, and men of business (not being lawyers), to inquire and report upon the Sanskrit books that are generally supposed to contain Hindû law. Of this commission the principal duty should be to collect all the admissible evidence forthcoming to show that such books, all or any of them, have at any time, either consciously or unconsciously, been regarded by the population of South India, or by any part of it, as books containing law, and therefore as authorities obligatory on men's consciences. I have searched in vain for such evidence: I honestly believe that not a particle of it can anywhere be found. If a properly

<sup>1</sup> V. N. Mandlik (at *Hindû Law*, p. 479) does me the honour of saying that I have 'successfully exploded the doctrine' relied on in that case, and 'of affirming in respect of Bombay every word of what I have said in reference to the Madras Presidency.'

appointed commission were to report that no such evidence is forthcoming, the monster called 'Hindoo Law' would be quietly slain and buried without delay, and Government would begin the task of collecting and arranging in a simple form the few primitive usages and customs that are common to all or most Indian castes.

The best method of finding out the usages and customs of the Indian castes would be by appointing all the principal officers of each District to be a committee for the purpose of inquiring into the matter, and a District Judge of experience, and who would be likely to take an interest in the work, to collect, arrange, and appraise information to be supplied to him by the District Committees. With such machinery at his disposal, an active investigator should have no difficulty in doing all that was wanted of him within a year or so.

Great care and skill would be called for in framing the questions to be sent to the District Committees. Perhaps nothing has tended more largely to obscure and distort the whole question of Hindû law than has the inveterate habit of borrowing from the English and Roman systems of law supposed 'apt equivalents' for the ideas and phrases of the Sanskrit text-books. Thus, for example, Colebrooke has rendered *Dâya-bhâga* into English by the phrase 'partition of heritage'; and thereby doubtless has caused many persons to associate in their minds with the Sanskrit concept the Roman '*hereditas*' and the English 'writ of partition.' But *dâya* seems to mean no more than what is 'given,' and *bhâga* is simply share. And the

compound term would appear to indicate in the first place the primitive and natural practice of the father, on his death-bed or when infirm with age, *giving* his sons and others *shares* of his wealth. Again, on taking up any manual of Hindû law, probably the first thing one notices will be the phrase 'family,' which ordinarily is deemed to mean a number of males living together in coparcenary, with their females and slaves, under the management of a chief. But what is the particular Sanskrit phrase for which 'family' can be said to be an apt equivalent? <sup>1</sup>

In propounding questions I would scrupulously avoid the use of any word that even remotely resembles a term of art, or that connotes ideas proper (or supposed to be proper) to any system of law. Thus, instead of asking about 'adoption' (which connotes debt to ancestors, *Put*, and the rest), I would ask about 'taking' a child. Putting aside the ideas connected with the word 'family,' I would rather inquire about the ideas connected with the word 'house,' such as *ahamudeiyân* (householder), *illāṭa*, &c. Declining to assume that what we understand by 'wedding,' 'betrothal,' and 'marriage' has an exact counterpart in South India, I would put questions about 'asking for' a girl, and 'taking her home.' Ignoring the word *dâyâda* (cosharer), I would try to discover whc

<sup>1</sup> *Kula*, *Kuṭumba*, *Gotra*, and other words mean race or tribe; not the unit consisting of a man and his wife and children, with perhaps two or three near relatives living under his roof. We have our idea of a family, the Romans had their *familia*: I am not aware that the Âryans of India had a corresponding idea. With them, if I mistake not, the *griha* (or house) was more regarded than the company of persons who happened at any time to live in it.

call one another 'elder and younger brothers.' For 'non-division' I would say living or being together, and so on, and so on.

The most important questions to be asked would concern the various modes of beginning, keeping up, and putting an end to a 'house' or family. According to Buchanan, ii. 411, amongst the *Nairs* girls marry before they are ten, and their husbands, though they support, never cohabit with them, but the young wife takes as her mate any high-caste man who may please her.<sup>1</sup> In such state of things how is a 'house' begun? I should suppose by the wife bearing children in her brother's house; but this supposition may be altogether wrong. Again, when the father cohabits with the infant son's adult wife, where can the house be said to begin? Inquiry no doubt will make all these things plain. Where a house has once been set going, it may be kept up by various methods, as by the husband begetting children on the body of his wife, or suffering a kinsman to do it for him;<sup>2</sup> by taking a child into the house from outside; by following the *illatā* custom; or by preventing the daughter marrying a man, and so causing her to bear children for the benefit of the house. The end of a house may come by the father dying and the sons resolving not to live together, or by the succession coming to a daughter, and in divers other ways.

<sup>1</sup> See p. 146, note 2, above.

<sup>2</sup> See the *Mahābhārata*, *Ādi-parva*, Chap. 122, l. 147, p. 2, cited by V. N. Mandlik, wherein the impotent Paṇḍu advises his wife Kunti to do *niyoga* and keep up his line.

With regard to rights to or over things, questions should be framed with the aim of ascertaining with precision what may be the popular Indian ideas as to their nature and extent, and particularly as to separate rights of individuals. I see good reason to suspect that the ordinary Tamil or Telugu cannot at all comprehend the difference between *meum* and *tuum*, because he never by any chance speaks or thinks of anything as being his very own ; though he habitually speaks of things as being 'ours,' which in reality belong to some one else. And, probably, inquiry would show that in South India a thing of value always is regarded as being part of an aggregate, estate or *corpus*, rather than as a thing belonging to a person or persons : whilst the aggregate, estate or *corpus*, is regarded as a permanent institution remaining always under the protection and management of a chief or elder, rather than as a subject of property, capable of being consumed or made away with at the pleasure of a *dominus*. In other words, the South Indian regards the duty of the man towards the estate rather than the right of the man to or over the estate. I may be utterly mistaken as to the popular notion of property. But I am firmly persuaded that, whatever it may really be, it must be radically different from and antagonistic to the idea of the Madras High Court that 'a member of an undivided family can alienate joint ancestral property to the extent of his own share.' Indeed, I strongly doubt if the idea of selling ancestral lands ever entered the head of a Tamil or Telugu until British



officers began to sell estates by public auction. The Indian landholder who is in pressing need of money, borrows. He does not think of handing over to strangers what belongs to, or rather forms an integral part of, his 'house' or family.

I believe that throughout South India the father or other manager of the family is supposed to have unlimited control over the revenues, profits, or income of the family ; and that so long as he manages affairs in a reasonable and customary manner, no one can call him to account for his acts. But, on the other hand, it seems to be probable that he is supposed to be under an obligation to pay all debts incurred, for whatever purposes, by his sons or other dependants ; and definite information upon this point is essentially necessary.

Having gotten knowledge of the actual usages and customs, and of the ideas of the general population, the next thing for Government to do would be to publish for the information of its judges a concise statement of the results arrived at, to be styled the book of '*Usages and Customs.*' It might then go on to draw up a set of rules for the guidance of the courts of justice in deciding causes in which the dispute involves questions of marriage, succession, inheritance, and the like. These rules should be of the most general character, and merely provisional. Not a single 'settled principle' or definition should be found in them. Their main object should be to point out with some precision the right method of using the facts contained in the concise statement

above spoken of, in connection with the provisions of the enabling Act that I have proposed. And here I think I should give a rough specimen of the rules that, in my opinion, might with advantage be drawn up. It should be declared that where either party challenges an act as being contrary to the custom of his caste and wrong, but it appears from the '*Usages and Customs*' that acts of the kind habitually are done by all or most of the principal castes, and the act appears to the Court to be in itself indifferent, the Court shall, without going into evidence upon the point, decide then and there (for the purposes of the particular suit) that the act was right and proper. But where the '*Usages and Customs*' was against the act, I would have the rule to be that the Court should take, or not take, evidence as to the custom, according as it did, or did not, think the act not to be in itself indifferent.

Another main object of the rules should be to instruct the courts as to the proper modes of procuring information where a question of custom must be decided upon evidence. In some important cases, it seems to me it would be highly convenient that the District Court should withdraw the suit and itself decide the question of custom, after making a very full inquiry, at the expense of Government. In such cases the Heads of the Caste of the parties should be examined *vivâ voce* or by interrogatories, after having been made clearly to understand that their answers would estop them and their descendants in any subsequent litigation involving the solution of the same

question. And the opinions of *Gurus* might often be of value. In less important cases, it might be sufficient to send a commissioner to the principal seat of the caste, there to make a local inquiry.

Since in a very considerable proportion of the contested suits disposed of by our tribunals the decision turns mainly on a disputed fact of marriage, adoption, or division, Government should lose no time, I think, in extending the provisions of the Registration Act. Probably no judicial officer will deny that an immense amount of good has been done of late by the introduction of compulsory registration of ordinary business documents. And if so, surely it would be a marvel were anything but good to result from the compulsory registration of marriages, adoptions, divisions, and other usual social acts of Indians. The machinery for registering them not only exists : it is working, and, I believe, excellently well. I sincerely hope, therefore, that Government before long will think fit to give the country the full measure of benefit obtainable from its working.

At the same time I would earnestly invite attention to the complex provisions of the French Code which deal with the rights and duties of the Family Council. It appears that the institution has flourished in this country, and done much good ; and doubtless, with a little wise management, Government might revive, even increase, its usefulness. In England the individual is everything, the family of no account. Consequently Englishmen can hardly be expected sufficiently to sympathise with Indians in adjusting

the delicate relations of the family. But the French have thought out the whole matter, and we should go to them for instruction about it.

The position, rights, and correlative duties of the Managing Member, though incapable as yet of exact definition, might nevertheless be recognised by the legislature together with those of the family council. And provision might be made for registering the name of every Managing Member of a family possessing an estate of a certain value.

Lastly, I would suggest as essentially requisite, what no doubt to many will seem a reactionary step of the worst kind, the distinct official and judicial recognition of the Heads of Castes. So long as we choose to ignore the existence of these natural leaders of the people, whose functions are entirely peaceful and conservative, we are deliberately cutting ourselves off from all communication with the people, and maintaining the existence of a state of ignorance that is most discreditable, and may be most dangerous to the stability of the British rule. The Heads of Castes were treated with great respect in the last century, and in return performed most useful offices. But of late we have all but abolished their power, and have wholly rejected their co-operation. And now, when we want to learn the feelings of the people about any matter, we content ourselves with meagre and perfunctory reports from Brahman officials, who are strangers and foreigners in the land equally with ourselves.

To sum up : in order to carry out the traditional

policy of the British Government, and redeem the oft-repeated promise that we will administer to the people their own laws and customs in all matters of marriage, succession, and the like, it is advisable, in my opinion, for Government to do certain things in a certain order, namely :—

1. We must have a relieving and enabling Act passed, so that Indians may understand that they are free agents in ordinary affairs, except in so far as they may voluntarily have given up their liberty for caste or other reasons.

2. A commission must report upon the Sanskrit books supposed (as I think, erroneously supposed) to contain law obligatory on the people of South India.

3. By means of District Committees, or otherwise, Government must find out what in fact are the usages and customs of the Brahman and non-Brahman castes. Particularly, information must be collected in respect to the constitution of the 'house' or family, the nature of Indian rights over things, the position of the Managing Member, and the like.

4. An account of the results so obtained must be published for the guidance of the courts.

5. A set of general practical rules must be framed, to show the courts how to use the account just above referred to, and take evidence about custom.

6. The registration of marriages, adoptions, divisions, and other common acts should be made compulsory.

7. Steps should be taken to revive and improve

the institution of the Family Council, and partially to recognise and define the position, rights, and duties of the Managing Member.

8. The Heads of Castes must be officially and judicially recognised.

When these things have been done, and the new system of administering Hindû law has been worked for some years, it will be possible, perhaps very easy, to draw up a Code of Hindû law upon the basis of the '*Usages and Customs*,' as modified and illustrated by select decisions of the District Courts and High Court.

Into that matter I need not enter. I have completed the work originally undertaken, and will wind up with the devout hope, *Non si male nunc et olim sic erit.*



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